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In the Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for all educationally deprived children in low-income areas, violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

PARTIES TO THE PROCEEDING

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the court of appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the district court and were appellees in the court of appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the district court and appellants in the court of appeals.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is not yet reported. The opinion of the district court (App., *infra*, 55a-59a) is unreported. The opinion in *National Coalition for Public Education and Religious Liberty* v. *Harris* (App., *infra*, 60a-103a), on which the district court relied, is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 104a-105a) was entered on July 9, 1984. A notice of appeal (App., *infra*, 106a-107a) was filed on August 2,

1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1979).[1]

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[1] The court of appeals held that the Establishment Clause of the First Amendment forbids the expenditure of funds appropriated under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, on remedial instruction for students of nonpublic religiously oriented schools, if that instruction occurs on the premises of those schools. As this Court has held (*Wheeler* v. *Barrera*, 417 U.S. 402, 422-423 (1974)) and as the court of appeals explicitly recognized (App., *infra*, 6a n.2, 24a), Title I authorizes such expenditures. Indeed, the legislative history of Title I shows that Congress specifically contemplated on-premises instruction (S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965)), and a regulation specifies that such instruction is to be provided only "to the extent necessary to" satisfy the statutory mandate that equal services be supplied to public and nonpublic school students (34 C.F.R. 200.73(a)). The record in this case amply demonstrates that on-premises instruction was in fact required in order to satisfy this mandate.

Since the holding of the court of appeals thus is that the Constitution prevents Congress from achieving a central purpose of the statute—that private and public school students have equal access to remedial instruction—our submission is that the court of appeals has "held [Title I] unconstitutional as applied to a particular circumstance" (*United States* v. *Darusmont*, 449 U.S. 292, 293 (1981)) and an appeal lies to this Court under 28 U.S.C. 1252. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982). Cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939). While the court of appeals did not explicitly state that Title I was unconstitutional as applied (as is normally required to found an appeal under Section 1252), this case is one of those unusual instances in which such a determination "was a necessary predicate to the relief" that it granted (*United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).

We note that in *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968), this Court held that a claim that New York City's Title I program violated the Establishment Clause—the same claim that is made by plaintiffs here—was properly brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282. The interpretation of Section 2282 sheds light on the meaning of Section 1252 because Section 2282 provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress "on ground of unconstitutionality," and both

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out at App., *infra*, 108a-127a.

STATEMENT

1. On February 27, 1984, this Court granted certiorari in *School District of the City of Grand Rapids* v. *Ball*, No. 83-990, to consider whether it is a per se violation of the Establishment Clause for a local school district, pursuant to a state-funded enrichment and remedial educational program made available to all children in the district, to provide secular supplementary instruction to nonpublic school students on the premises of religiously oriented schools. The United States filed a brief *amicus curiae* in *Grand Rapids*,[2] pointing out that Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, authorizes federal grants-in-aid to local educational agencies for the purpose of improving the education of economically and educationally deprived children. Our brief explained that Title I "specifically requires that provisions be made for the participation of eligible students who attend nonpublic schools" and that "[m]any local educational agencies have met this requirement by providing Title I remedial education services to eligible children on the premises of nonpublic schools." 83-990 U.S. Br. 1-2. We noted that the validity of the Title I program is being litigated in various federal courts, and that "this Court's decision [in *Grand Rapids*] is likely to have a substantial impact on the lower courts' consideration of the somewhat analogous legal and factual issues presented in the pending Title I cases." 83-990 U.S. Br. 3.

Section 1252 and Section 2282 were enacted as part of the same statute (Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752).

If the Court determines that it lacks appellate jurisdiction in this case, we request that it treat this Jurisdictional Statement as a petition for a writ of certiorari (see 28 U.S.C. 2103) and grant the petition.

[2] We have sent copies of this brief to the appellees.

This case is one of the pending federal cases we identified in which the validity of the federal Title I program has been drawn into question. See 83-990 U.S. Br. 2. On July 9, 1984, the United States Court of Appeals for the Second Circuit held in this case that the Establishment Clause renders Title I unconstitutional insofar as it authorizes the inclusion of students of religiously oriented nonpublic schools in a program that makes on-premises remedial education available on an across-the-board basis to all public and nonpublic school children who are economically and educationally deprived. We now seek review of that decision.

2. Congress enacted Title I in order to "'bring better education to millions of disadvantaged youth who need it most'" (S. Rep. 146, 89th Cong., 1st Sess. 5 (1965) (citation omitted)).[3] For nearly two decades, Title I has provided federal funds "to local educational agencies serving areas with concentrations of children from low-income families" for the purpose of "expand[ing] and improv[ing]" local educational programs that help meet "the special educational needs of educationally deprived children" (20 U.S.C. 2701). Title I funds typically sup-

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[3] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 464 (codified at 20 U.S.C. 3801 *et seq.*). Chapter 1 continues to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I (see 20 U.S.C. 3801), and its provisions concerning the participation of children in private schools are virtually identical to those of Title I. Compare 20 U.S.C. 2740 with 20 U.S.C. 3806. See also App., *infra*, 3a n.1. Because there are no material differences between the two statutes, and because the declaratory and injunctive relief ordered by the court of appeals (see *id.* at 54a) is not affected by the changes made by Chapter 1, this case is not moot. See, *e.g.*, *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 2 n.2. Like the court of appeals, we will continue to refer to the program as "Title I."

port programs such as remedial reading, remedial mathematics, and English as a second language (see H.R. Rep. 95-1137, 95th Cong., 2d Sess. 6 (1978)).

Local educational agencies seeking Title I funds submit an application, describing the programs for which funding is sought, to a state agency for approval. The state agency must file certain assurances with the Department of Education, which has authority to administer the program at the federal level and distribute appropriated funds. 20 U.S.C. 3802, 3871, 3876. The statute specifies criteria that a local program must meet in order to qualify for Title I funds. 20 U.S.C. 3805(b). In particular, the program must channel funds to students (i) who are educationally deprived, that is, who perform at a level below normal for their age, and (ii) who live in an area that has a high concentration of families with incomes below the poverty level. 20 U.S.C. 3805(b).

Congress was aware that many families in low-income urban areas send their children to nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974). Congress made it clear that students are not to be discriminated against in the provision of Title I benefits because they attend nonpublic schools: the statute requires each recipient local agency to ensure that "[e]xpenditures * * * for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools" (20 U.S.C. 3806(a); see also *Wheeler*, 417 U.S. at 420-421; S. Rep. 146, *supra*, at 11-12).

In particular, this Court has already recognized that Title I authorizes funds for remedial instruction of nonpublic school students, by public school teachers, on the premises of nonpublic schools. See *Wheeler*, 417 U.S. at 422-423. The statute and its implementing regu-

lations carefully specify the conditions under which such instruction will be permitted. The legislative history of Title I states that "public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. No. 146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins). Regulations require the recipient local educational agency to "exercise administrative direction and control over [the] funds and property" used in Title I programs (34 C.F.R. 200.70(c)) and specifically mandate that local educational agencies provide Title I services to nonpublic school children only by using public employees or contracting with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)). The regulations permit educational services funded by Title I to be provided on the premises of the nonpublic school only "[t]o the extent necessary to provide equitable services" to public and nonpublic school students and only if those services "are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b)). A public educational agency "must keep title to and exercise continuing administrative control of all equipment and supplies * * * acquire[d] with [Title I] funds" (34 C.F.R. 200.74(a)).

3. This case concerns the largest Title I program in the nation, that operated by the Board of Education of the City of New York. This program has now been in operation for 18 years, and the facts concerning its operation have been developed in detail in the record of this case. Those facts are essentially undisputed (App., *infra*, 10a, 56a n.1).

Approximately 13% of the over 300,000 students enrolled in Title I programs in New York City attend nonpublic schools, most of which are religiously oriented (App., *infra*, 7a; C.A. App. A32, A80-A81). Title I students are taught remedial reading, remedial mathematics, and English as a second language and are provided a clinical and guidance program designed to enhance achievement in those subjects (App., *infra*, 10a-11a). In accordance with Title I and its implementing regulations (see S. Rep. 146, *supra*, at 12; 34 C.F.R. 200.73(b)), Title I funds are not used to provide a program to the students of a nonpublic school if that school is itself offering a similar remedial program.

Initially, the Board did not offer Title I instruction on the premises of nonpublic schools. Instead, it required nonpublic school students who wished to participate in Title I programs to travel to public schools after regular school hours. Attendance at these sessions was poor. The Board then decided to hold some Title I classes in the nonpublic schools but after regular school hours. App., *infra*, 7a. This approach proved unsuccessful for similar reasons: "both students and teachers were tired, * * * there was concern about the safety of children travelling home after dark or in inclement weather, and * * * communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible" (*id.* at 8a).

The Board then considered holding the remedial classes for nonpublic school students in the public schools during school hours, but this plan was abandoned because of concerns that it would violate the New York Constitution (App., *infra*, 8a). In addition, a study showed that the transportation and other noninstructional costs that would have been incurred by conducting Title I classes for nonpublic school students at sites away from their schools would have amounted

to 42% of the entire Title I budget for nonpublic school children. In order to pay these costs, the Board would have had to deny Title I services to more than one-third of the nonpublic school students who were eligible for them (App., *infra*, 8a, 72a-73a).

After unsuccessfully "experimenting with [these] alternative programs" (App., *infra*, 71a), the Board decided, in 1966, to provide Title I instruction on the premises of nonpublic schools during school hours. All the teachers and other professionals who provide Title I services, with the exception of some physicians under special contract, are regular full-time employees of the Board. Teachers who are willing to teach Title I classes are assigned to nonpublic schools by the City. The Board does not inquire into teachers' religious affiliations when making assignments; the undisputed evidence is that the vast majority of the Title I teachers work in nonpublic schools with a religious affiliation different from their own. App., *infra*, 11a-12a, 74a. In addition, 78% of the teachers, and all of the non-teacher professionals, spend fewer than five days a week in any one school and work in more than one school in the course of the week.

The program of on-premises Title I instruction of nonpublic school students is designed to "'create[ ] the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school'" (App., *infra*, 14a (citation omitted)). Title I teachers are issued detailed written and oral instructions that emphasize that they are independent public service employees who are in no way responsible to the nonpublic school authorities. The private school principals are also informed of the requirement that the Title I teachers' role be kept distinct from the schools' religious aspects. Title I teachers are instructed not to introduce any religious matters

into their programs. They are also instructed not to engage in team teaching or cooperative instructional activities; they may consult with a nonpublic school teacher about a student's needs, but if they do they are not to engage in any religious discussion. App., *infra*, 12a, 74a.

Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. The nonpublic schools are not reimbursed for the classroom space. Both the nonpublic schools and the Title I teachers are informed that the Title I teachers have sole responsibility for selecting students for the program. The materials used in the classes have no religious content. The Board retains title to the materials and equipment used in Title I classes; the teachers are instructed to keep the materials locked in storage cabinets when they are not in use; and the materials are subject to an annual inventory. App., *infra*, 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. The field supervisors answer to the Board's program coordinators, who also make occasional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matter into a class. App., *infra*, 13a-14a, 87a.

4. This suit was brought in 1978 in the United States District Court for the Eastern District of New York by

six federal taxpayers. The plaintiffs alleged that the Constitution prohibits public employees from providing remedial education on the premises of religiously oriented nonpublic schools. They sought declaratory and injunctive relief against the operation of New York City's Title I program. Four individuals whose children attend private elementary schools in New York City and receive Title I educational assistance subsequently intervened as defendants (App., *infra*, 9a-10a; C.A. App. A2, A3-A7).

The district court stayed proceedings in this case pending the outcome of another suit, also challenging New York City's program of on-premises Title I instruction, that was pending before a three-judge court. *National Coalition for Public Education & Religious Liberty (PEARL)* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (App., *infra*, 60a-103a). The three-judge court in *PEARL* upheld the constitutionality of the program. The parties to this case then stipulated that this case would be heard on the record developed in *PEARL*, as supplemented by various affidavits and documents (App., *infra*, 10a, 56a).

The district court granted summary judgment for the defendants (App., *infra*, 55a-59a). The court agreed with the reasoning of the three-judge court in *PEARL* and rejected the plaintiffs' argument that *Meek* v. *Pittenger*, 421 U.S. 349, 367-373 (1975), compelled the conclusion that the Title I program was unconstitutional (App., *infra*, 56a-57a):

> Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program was not before the courts in *Meek*. * * *
>
> * * * [A]lthough arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demon-

> strates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional government activity * * *.

The court of appeals, relying principally on *Meek* v. *Pittenger*, *supra*, reversed (App., *infra*, 1a-54a). The court of appeals did not question any of the factual conclusions reached by the district courts that had considered New York's Title I program (see *id.* at 10a). Indeed, the court of appeals stated (*id.* at 4a):

> We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion.

The court of appeals also noted that "[w]hile other ways of using Title I funds for the benefit of students in religious schools can be found, these * * * are almost certain to be less effective, more costly, or both" (*id.* at 52a) and remarked that it could understand why the district court and the three-judge court in *PEARL* "struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm" *(ibid.)*.

The court nevetheless ruled, principally on the authority of *Meek*, that "the Establishment Clause, as it has been interpreted by the Supreme Court * * * con-

stitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise" (App., *infra*, 4a; see *id.* at 36a-39a, 50a-53a). The court of appeals interpreted *Meek* as creating a per se rule that the supervision needed to ensure that public employees do not further a nonpublic school's religious purposes necessarily creates "a constitutionally excessive entanglement of church and state" (*id.* at 36a (footnote omitted)). The court specifically stated that it was not ruling on "the merits of the argument" that the supervision of public school teachers in a nonpublic school need not create an unconstitutional degree of entanglement (*id.* at 53a); it made clear that it simply felt itself to be bound by the dictates of *Meek*. The court of appeals refused to consider the contention that the facts in the record about the actual operation of the New York program demonstrated that public employees can teach in religiously affiliated schools without endangering the values underlying the Establishment Clause; the court stated that this Court in *Meek* "was aware that programs having safeguards like the City's could be devised and might prove sufficient to prevent teachers and counselors from fostering religion" (*id.* at 37a n.16) but had nonetheless ruled that all such programs necessarily violate the Establishment Clause.

THE QUESTION IS SUBSTANTIAL

The court of appeals has invalidated a central feature of the nation's largest, most important, and most successful federal program for improving the education of disadvantaged children. Even though the court had before it an extensive and undisputed factual record, its decision rests not on an assessment of the actual operation of the program at issue but on *a priori* suppositions about the effects of allowing public employees to teach in nonpublic schools. Contrary to the conclusion

of the court of appeals, this Court's decisions do not establish a per se rule absolutely forbidding public employees from providing remedial instruction on the premises of religiously oriented schools. Moreover, the facts of this case furnish no basis for concluding that New York City's Title I program fosters a constitutionally impermissible degree of entanglement between church and state or violates the Establishment Clause in any other way. Further review is therefore warranted.

1. "Under the precedents of this Court a [measure] does not contravene the Establishment Clause if it has a secular * * * purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980); see, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). There is no question that the Title I program has the secular purpose of providing educational opportunities for disadvantaged children (see App., *infra*, 76a-77a); plaintiffs have so conceded (C.A. Br. 20). It is also clear that the Title I program does not have the principal or primary effect of advancing religion. Title I remedial instruction is provided to all school children, in public and nonpublic schools alike, on an equal basis. See *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 8-9. The undisputed record demonstrates that Title I teachers in New York City's nonpublic religiously oriented schools did not further the religious mission of those schools at any time; they taught secular subjects and there is no evidence that they ever injected religious material into their classes. Of course, the availability of on-premises remedial instruction may have made the religiously oriented schools more attractive to students and their parents than they would otherwise have been, but it is settled that that possibility does not make the program of on-premises instruction suspect under the Establishment Clause. See, *e.g.*, *Board of Education* v. *Allen*,

392 U.S. 236, 242 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947).

As the court of appeals explicitly stated (App., *infra*, 38a), the sole basis of its holding was its conclusion that New York City's Title I program brings about excessive entanglement between the government and religiously oriented schools. The court ruled that constitutionally impermissible entanglement results from "the active and extensive surveillance which the City has provided" to ensure that Title I teachers do not aid the religious mission of nonpublic schools (*id.* at 39a).[4] But the only "surveillance" involved in New York City's Title I program is the supervision of public school employees by public education authorities. The City does not conduct any "surveillance" of persons subject to the authority of any nonpublic school (cf. *Lemon*, 403 U.S. at 614-621) or in any way involve itself in the " 'details of administration' " of a religious institution (*id.* at 615, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 695 (1970) (opinion of Harlan, J.)). The requirements imposed on the nonpublic school by virtue of the fact that instruction takes place on its premises are unambigious and resemble those of other public regulatory programs, such as fire and building safety codes: the nonpublic school must maintain a classroom in a certain condition and must allow supervisors on the premises for unannounced inspections.[5] The City's supervi-

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[4] It is at least ironic that the Establishment Clause should be deemed violated for the very reason that scrupulous care has been taken to guard against its violation.

[5] The Title I program involves certain other limited contacts between public employees and nonpublic school personnel—for example, they must discuss scheduling problems and other minor administrative details (see C.A. App. A55, A58) and consult about students' educational needs (see App., *infra*, 12a)—but these contacts would occur even if Title I classes were taught on the premises of public schools. Moreover, consultations about minor administrative concerns are most unlikely ever to implicate religion (see C.A. App. A58), and any public welfare

sion of the Title I teachers, by contrast, covers more facets of their day-to-day performance and may require the supervisors to make subjective judgments. But such supervision does not entangle church and state; it only "entangles" the public education authorities with their own employees.

It is true that one purpose of that supervision is to ensure that Title I teachers do not inject any impermissible religious material into their classes. But public school authorities routinely supervise all of their teachers partly for the purpose of ensuring that they do not improperly impose on their students their personal views on religion or other sensitive subjects. This Court has upheld off-premises remedial instruction, by public school teachers, of classes composed entirely of sectarian school students. *Wolman* v. *Walter*, 433 U.S. 229, 246-248 (1977). There is no justification for the court of appeals' conclusion that the mere fact that such a class is conducted on nonpublic school premises necessarily and inevitably means that the government's supervision of its own employees will involve an "entanglement" with religion.

Meek v. *Pittenger* should not be considered controlling in this case. *Meek* involved a state statute that provided for, among other things, remedial instruction by public school teachers on the premises of nonpublic schools. The Court invalidated this program on entanglement grounds, but its holding rested in significant part on the conclusion that the statute "create[d] a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife'" (421 U.S. at 372, quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794 (1973); see App., *infra*, 94a-95a n.12). This danger was present because state aid to nonpublic school students and state appro-

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agency that deals with a sectarian school student may have occasion to consult with his teachers.

priations for public schools were addressed by separate statutory schemes and considered by the legislature—in an annual appropriations process—independently of each other (see 421 U.S. at 352, 372). As a result, the amount of aid to be provided to nonpublic school students would have been a subject of recurring controversy, creating a risk of "repeated confrontation[s] between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id.* at 372). Title I, by contrast, is a single statutory scheme that provides aid to students in both public and nonpublic schools according to a fixed rule of per-student parity. See 20 U.S.C. 3806(a). As a result, Title I does not focus debate on the amount of aid to be given to nonpublic school students. In its nearly 20 years of operation, Title I has not precipitated religious division in the political arena; the court of appeals did not suggest otherwise. The danger of "political entanglement" that was an important basis of the holding in *Meek* therefore does not call into question the validity of any Title I program.

More important, the state program at issue in *Meek* was challenged soon after it was enacted, and the record provided little information on how it was implemented. See App., *infra*, 96a-97a. The Court accordingly did not have an opportunity to determine whether a comparable program could be administered in a way that would prevent excessive entanglement.[6] In this case, however, the Court has before it a record demonstrating that New York City has avoided the dangers identified by the Court in *Meek*.

For example, a premise of the decision in *Meek* was that the remedial instruction would be offered under circumstances "in which an atmosphere dedicated to the

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[6] See also *Regan*, 444 U.S. at 661 (*Meek* did not hold "that any aid to even secular education functions of a sectarian school * * * is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities").

advancement of religious belief is constantly maintained" (421 U.S. at 371). By contrast, in *Wolman* v. *Walter*, *supra*, the Court upheld the provision of remedial instruction to sectarian school students by public school teachers when "the services are to be offered under circumstances that reflect their religious neutrality" (433 U.S. at 247). Here, New York has taken care to offer Title I instruction only in circumstances that reflect religious neutrality.

Similarly, in *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, 188 Neb. 1, 195 N.W. 2d 161, cert. denied, 409 U.S. 921 (1972), the Nebraska Supreme Court upheld a Title I program that provided remedial instruction on the premises of a Catholic high school. Justice Brennan, concurring in the denial of certiorari, explained that "the school district * * * [has] no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses * * * operate completely independently of that curriculum and of the Catholic school administration." 409 U.S. at 926. The record in this case shows that New York City's Title I program operates in the same way.

2. As we have noted, in *School District of the City of Grand Rapids* v. *Ball*, cert. granted, No. 83-990, this Court has agreed to review a question similar to that presented here in the context of a state program that resembles Title I in some, but not all, respects. The parties in *Grand Rapids* agree that there are "important differences" between Title I and the Grand Rapids program (Br. in Opp. 6; see Pet. 26), and we have discussed the similarities and differences between the *Grand Rapids* program and Title I in the Brief for the United States as Amicus Curiae in *Grand Rapids* (83-990 U.S. Br. 25-30). As we explain there, a decision by this Court in favor of the parties challenging the state program at issue in *Grand Rapids* will not neces-

sarily resolve the constitutionality of Title I instruction of the kind involved here.

We believe that this case should be heard by the Court together with *Grand Rapids*.[7] The two cases will illumine each other and give the Court an opportunity to give comprehensive and informed consideration to the important issues presented by federal and state efforts to improve the education of American children on an across-the-board basis—one that does not discriminate against those who choose to exercise their constitutional right to send their children to religiously oriented schools. More particularly, we believe that there are important considerations that militate in favor of considering this case now on plenary briefs and argument rather than simply holding it for disposition in light of this Court's eventual decision in *Grand Rapids*.

a. The court of appeals' decision strikes down an integral aspect of a large and very important federal education program. It is therefore appropriate for the Court to review the court of appeals' decision without the additional delay that would be occasioned by an order remanding this case for further consideration in light of *Grand Rapids*.

Annual appropriations under Title I are on the order of $3 billion, and over five million students participated in Title I programs in a recent year (C.A. App. A251). As we have noted (see page 5, *supra*), when Congress

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[7] In order to enable the Court to hear *Grand Rapids* without undue delay, we will be prepared to file a brief on the merits in this case by October 15, 1984. This should enable the Court, if it wishes, to hear oral argument in *Grand Rapids* and this case without substantial delay. The Chancellor of the Board of Education of the City of New York and the private defendants who intervened in the district court have also appealed from the judgment of the court of appeals, and we are advised that they intend to file jurisdictional statements. We have been authorized to state that they too will be prepared to file briefs by October 15, should the Court wish to consolidate the three appeals.

enacted Title I it was aware that many disadvantaged students attend nonpublic schools, and it was concerned that they not be denied equal benefits because their parents chose to provide them that form of education. As this Court has said about Title I, "[t]he Congress * * * recognized that all children from educationally deprived areas do not necessarily attend the public schools, and * * * since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act." *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1979) (emphasis in original; footnote omitted).

The public officials whom Congress made responsible for administering the Title I program at issue in this case concluded, after experimenting with alternative programs, that it would be self-defeating to attempt to provide remedial education to nonpublic school students in any way other than on the premises of the nonpublic school. See pages 7-8, *supra*. The record of this case shows—and every court that has considered the record has agreed—that their conclusion was amply justified. The court of appeals itself recognized that as a result of its decision, many students who now receive Title I remedial instruction would no longer be able to do so (see App., *infra*, 4a, 8a, 52a).

The court of appeals' decision has, therefore, frustrated Congress's intentions in a direct way. This Court should review promptly—without a second round of proceedings in the court of appeals—a decision that has such a far-reaching impact and that is so inconsistent with Congress's design. Congress's principal purpose in enacting 28 U.S.C. 1252 (the statute under which we invoke the Court's jurisdiction) was to ensure prompt review by this Court of judicial decisions that affect many persons and frustrate Congress's intentions. See, *e.g.*, *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 11-12 & nn. 14, 16, 19; *McLucas* v. *DeCham-*

plain, 421 U.S. 21, 31 (1975); H.R. Rep. 212, 75th Cong., 1st Sess. 2 (1937).[8]

b. The constitutionality of Title I remedial instruction on the premises of religiously oriented schools is a frequently recurring issue that has been before this Court before. See *Wheeler* v. *Barrera*, *supra*; *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, *supra*. See also *Flast* v. *Cohen*, *supra*; *National Coalition for Public Education & Religious Liberty* v. *Harris*, appeal dismissed for want of jurisdiction, 448 U.S. 808 (1980). Indeed, in *Wheeler*, the Court granted plenary review of this question, and then determined that it was inappropriate to resolve the issue until a specific Title I program was before it. See pages 21-22, *infra*. Title I programs in Kentucky and Missouri have also been challenged, on Establishment Clause grounds, in cases pending in district courts. *Barnes* v. *Bell*, Civil No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980); *Wamble* v. *Bell*, Civil No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977). It seems likely that this important constitutional question, which arises so frequently, will have to be resolved by this Court.

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[8] The sponsor of the bill that became Section 1252 stated that its purpose was to "shut[ ] off a long period of suspense for the litigants in other cases" if a federal statute were declared unconstitutional (81 Cong. Rec. 3256 (1937) (remarks of Rep. Sumners)). As we note in text, ~~infra~~, other challenges to Title I programs are now pending. This Court has already held that a challenge to New York City's Title I program had to be brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282—a statute enacted simultaneously with Section 1252 and serving comparable purposes (see pages 2-3, note 1, *supra*)—precisely because a decision upholding a "constitutional attack on New York City's federally funded program[ ] * * * would cast sufficient doubt on similar programs elsewhere as to cause confusion approaching paralysis to surround the challenged statute." *Flast* v. *Cohen*, 392 U.S. 83, 89-90 (1968).

This case is a particularly—perhaps uniquely—appropriate one for the Court to review for that purpose. It presents the Establishment Clause question in the context of a major national program. Moreover, the court of appeals' ruling applies to the largest Title I program in the nation; the remedial education of one-fifth of all the nonpublic school students who receive Title I services will be affected by the decision in this case (see C.A. App. A32, A251). The issues have been considered by a three-judge court as well as by the district court and court of appeals below.

Perhaps more important, the record in this case provides a detailed—and essentially undisputed—portrait of the operation of an on-premises instructional program over a period of more than 15 years. In *Wheeler* v. *Barrera*, *supra*, this Court, after granting certiorari on the question of the constitutionality of on-premises Title I instruction, declined to resolve the issue in part precisely because it lacked concrete facts about the operation of any particular program (417 U.S. at 426):

> [If] on-the-premises parochial school instruction [is provided], * * * the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time we intimate no view as to the Establishment Clause effect of any particular program.
>
> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971). It would be

wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us.

In general, the Court's decisions under the "entanglement" branch of Establishment Clause analysis rest on empirical judgments about several issues: how public employees will perform on the premises of religiously oriented schools; what means are available to education officials in their efforts to supervise teachers; how willing officials are to provide, and teachers are to accept, the necessary supervision; and whether there must be extensive and problematic dealings between public authorities and the nonpublic schools whose students are aided by the public program. The record in this case provides the Court with an unusually complete basis for making these empirical judgments.

c. Finally, the nature of adjudication under the Establishment Clause in cases involving aid to nonpublic school students makes it particularly appropriate for the Court to consider this case in tandem with *Grand Rapids*. As the Court has frequently noted, in this area the law must be particularly sensitive to the specific facts of the program at issue, and doctrine develops on a case-by-case basis, not in broad strokes. See, *e.g.*, *Lemon*, 403 U.S. at 624-625; *Regan*, 444 U.S. at 662; *Nyquist*, 413 U.S. at 761 & n.5.

By considering this case and *Grand Rapids* together, the Court will be afforded a more complete view of the "range of possibilities" (*Wheeler*, 417 U.S. at 426) of on-premises remedial instruction. As a result, the Court will be able to make its decision on the basis of wider information and will be able to provide more complete guidance to lower courts. By contrast, a decision in *Grand Rapids* alone may leave unresolved the constitutional questions that the court of appeals' decision raises about the program that has been challenged in this case.

CONCLUSION

Probable jurisdiction should be noted. We ask that the Court schedule the case for oral argument in tandem with No. 83-990, *School District of the City of Grand Rapids* v. *Ball*, and we are prepared to file our brief on the merits on an an accelerated basis to the end that this may be done without undue delay.[9]

Respectfully submitted.

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AUGUST 1984

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[9] As we explained (see page 18, note 7, *supra*), all of the parties appealing from the court of appeals' decision are prepared to file a brief by October 15, 1984, in time to allow the Court to hear oral argument on this case (and *Grand Rapids*) without undue delay.

84-238

No.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 964—August Term 1983

(Argued: April 4, 1984 Decided: July 9, 1984)

Docket No. 83-6359

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs-Appellants,

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellees,

—and—

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*,
FRIENDLY and OAKES, *Circuit Judges*.

Appeal by plaintiffs from an order of the District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, granting defendants' motion for summary judgment and dismissing the complaint in an action seeking declaratory and injunctive relief with respect to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 *et seq.*, as applied by the New York City Board of Education, on the ground that it violates the Establishment Clause of the First Amendment. See also *National Coalition for Public Education & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed for want of jurisdiction*, 449 U.S. 808 (1980).

Reversed.

STANLEY GELLER, New York, New York, *for Plaintiffs-Appellants*.

MICHAEL JAY SINGER, United States Department of Justice, Washington, D.C., *for Defendant-Appellee Secretary of Education*.

LORNA B. GOODMAN, Assistant Corporation Counsel, New York, New York (Frederick A.O. Schwarz, Jr., Corporation Counsel,

and Leonard Koerner and Michael Gage, New York, New York) *for Defendant-Appellee Chancellor.*

JOHN J. BUCKLEY, JR., Charles H. Wilson, Paul Mogin, Washington, D.C. (Williams & Connolly, Washington, D.C.), Joseph C. Markowitz (Parker Auspitz, Neesemann & Delehanty, New York, New York), *for Intervenor-Defendants.*

FRIENDLY, *Circuit Judge*:

The venerated language of the First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Title I of the Elementary and Secondary Education Act of 1965 ("the Act"), 20 U.S.C. § 2701 *et seq.*,[1] declared it to be the policy of the United States to provide financial assistance to local educational institutions serving areas with concentrations of children from low-income families to expand and improve their educational programs which contribute particularly to meeting the special educational

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1 Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 *et seq.*, which incorporates by reference many sections of former Title I and includes virtually identical provisions governing the participation of nonpublic school students. The decision below and the parties before us uniformly refer to Title I and the regulations issued thereunder, *see* 45 C.F.R. Part 116a (1979), and for clarity's sake we shall do likewise.

needs of educationally deprived children, and authorized the Commissioner, now the Secretary, of Education to make payments to State educational agencies for grants made on the basis of entitlements created by the statute. Since 1966 New York City ("the City") has been receiving federal funds to finance programs wherein it sends public school teachers and other professionals into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services to students meeting the standards of the Act and the Secretary's regulations thereunder. The question is whether the Establishment Clause permits this.

We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion. However, we hold that the Establishment Clause, as it has been interpreted by the Supreme Court in *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974); *Meek v. Pittenger*, 421 U.S. 349 (1975) (particularly Part V, pp. 367-72); and *Wolman v. Walter*, 433 U.S. 229 (1977), constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here. A more elaborate statement of the facts follows.

The Facts and the Proceedings in the District Courts

The Act provides for annual Congressional appropriations for programs proposed by local educational agencies ("LEAs") and approved by state education agencies ("SEAs"), 20 U.S.C. § 2731. All programs are administered solely by the LEA in the particular area and are staffed entirely with the LEA's employees. 20 U.S.C. § 2734(m); 45 C.F.R. §§ 116.42, 116a.23(f). To be eligible for Title I funds, a program must satisfy certain statutory criteria that are designed to assure that the Act's purposes are advanced. For example, Title I funds may be provided only to children who meet the dual eligibility requirement of (1) educational deprivation, defined as below age-level performance, and (2) residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. 20 U.S.C. §§ 2722, 2732-34. Federal financing is available only for programs that will supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds. 20 U.S.C. §§ 2734(f), 2736(c).

20 U.S.C. § 2740(a) provides:

> To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section

> for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

Regulations issued by the Secretary require that each LEA provide services designed to meet the needs of educationally deprived children who attend private schools, *see* 45 C.F.R. § 116a.23. Going somewhat beyond the statute, the regulations provide that the types of services to be provided shall be determined "on a basis comparable to that used in providing for the participation of public school children." *Id.*[2]

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[2] If we were to look only at the language of the statute, we would not be altogether sure that a program sending public school teachers into religious schools was authorized. The examples given, to wit, dual enrollment, educational radio and television, and mobile educational services and equipment, would indicate that Congress was sensitive to the serious Establishment Clause questions that would be posed by sending public school teachers into a religious school and wished to avoid them. Consistently with such an intention, the equality requirement goes only to the amounts expended and not to the manner of expenditure. A construction that sending public school teachers into parochial schools was not intended would also have been supported by the canon of construing so as to avoid serious constitutional doubts, *see, e.g., Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928). However, drawing on a statement in the Senate report, S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965), and remarks of two Congressmen, the Supreme Court said with respect to Title I in *Wheeler v. Barrera*, 417 U.S. 402, 422-23 & n.18 (1974) (footnote omitted), that

> > [i]t was anticipated, to be sure, that one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction, and on remand this is an option open to these petitioners and the local agency.
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> This language, as shown by n.18, was a paraphrase of the Senate Report, not a holding of constitutionality.

The New York City Board of Education ("the Board") has developed elaborate procedures, not questioned here, for identifying the "target public school attendance areas" satisfying the economic disadvantage criteria for Title I eligibility[3], *see* 20 U.S.C. § 2732, and the students in need of remedial instruction, *see* 20 U.S.C. § 2734(b). New York State has developed procedures, also not criticized here, for determining New York City's share of the Title I funds received by it. The New York City Board of Education allocates these funds between public and nonpublic school children according to a *per capita* formula based on the total number of public and nonpublic school students determined to be eligible for Title I services. These amounts are then scaled down to take account of budgetary constraints. In 1981-82 the nonpublic school population benefitting from the City's Title I program constituted 13.2% of the total. The constitutional problem arises from the fact that the vast majority of these nonpublic school students attend religious schools, with schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn accounting for 84% of such students and Hebrew day schools accounting for another 8% (1981-82 figures).

The City's initial Title I program for nonpublic school students required them to travel to public schools after regular school hours to receive remedial services from public school employees. When attendance lagged, the Board transferred some Title I services to nonpublic schools after regular school hours while maintaining other services at off-premises sites. Attendance, however, remained poor. The reasons assigned for the failure of the

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3 For the 1981-82 school year, 561 of more than 900 public school attendance areas were so identified.

programs were that both students and teachers were tired, that there was concern about the safety of the children traveling home after dark or in inclement weather, and that communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible. A solution whereby nonpublic school students could participate with public school students in programs conducted at public schools during the regular school day was rejected in part because of doubts whether under Art. XI, § 3, of the New York Constitution[4] nonpublic school students could participate with public school students in programs conducted on public school premises during regular school hours. In consequence, on August 31, 1966, the Board adopted a resolution that remedial reading, remedial arithmetic, speech therapy and guidance counseling for educationally disadvantaged children in nonpublic schools be provided on the latters' own premises by peripatetic public school employees who would go from one school to another during the school day. Essentially that program has been continued to the present time. A study made for the 1977-78 school year indicated that a program whereby the nonpublic school students would be transplanted to public schools would involve additional expense for transportation and other costs of more that $4.2 million, which would have been more than 42% of

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4 This provides:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

budget for the nonpublic school Title I program. Apart from the large reduction in instructional and other services thereby entailed, the off-premises program, as alleged by the City, would have been less effective for reasons already indicated.

We interrupt this statement of the facts to indicate how the case comes before us. In 1976, the National Coalition for Public Education and Religious Liberty brought an action in the District Court for the Southern District of New York against the Secretary of Health, Education and Welfare, the United States Commissioner of Education, and the Chancellor of the New York City Board of Education to enjoin the program thus partially described as violative of the Establishment Clause. *See National Coalition for Public Education & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) [hereafter cited as "*PEARL*"]. An evidentiary hearing was conducted before a three-judge court in May 1979. Pursuant to an agreement reached at a pretrial conference the defendants presented the bulk of their case in the form of a narrative summary which synthesized numerous affidavits and documentary evidence describing the operations of the City's Title I program in nonpublic schools. A few witnesses were also called. In an able opinion by Senior District Judge Tenney, the court expressed itself satisfied that the program as carried out did not violate the Establishment Clause and dismissed the complaint. An appeal to the Supreme Court was dismissed for want of jurisdiction, 449 U.S. 808 (1980). We were told at argument that this was because of untimeliness.

Meanwhile, on August 11, 1978, this action for declaratory and injunctive relief with respect to the City's plan was brought by six federal taxpayers, *see Flast v.*

Cohen, 332 U.S. 83 (1968), in the District Court for the Eastern District of New York but was stayed pending the final determination of the *PEARL* case. Four individuals whose children attend nonpublic schools in the City and receive remedial educational assistance under Title I, represented by the same counsel who had represented the parent intervenors in *PEARL*, were permitted to intervene as defendants. The parties stipulated that the case was to be decided upon the record in *PEARL*, along with certain affidavits supplementing those previously filed. Judge Neaher, agreeing with the three-judge court in *PEARL*, granted defendants' motion for summary judgment and dismissed the complaint. Plaintiffs did not dispute the correctness of defendants' assertions about the basic facts, as distinguished from interlarded conclusions, insofar as such facts could be within the knowledge of the witnesses and affiants, and we have drawn and will continue to draw upon the various statements and affidavits, particularly the defendants' Statement of Material Facts Not In Dispute under former Rule 9(g) of the Eastern District, generally without particularizing the source.

Under the City's program the Board provides nonpublic school students—primarily, as we have stated, students enrolled in religious schools—with five types of remedial services: remedial reading, reading skills centers, remedial mathematics, English as a second language, and clinical and guidance services. No form of remedial service is provided with Title I funds if it is being provided by the nonpublic schools. The first four types of services are described in the margin.[5] The clinical and guidance

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5 As stated in defendants' Rule 9(g) statement, ¶ 49:

(a) The remedial reading program is designed to supplement the students' regular reading program and to raise the achievement

program is designed to enhance achievement in the four instructional programs by providing diagnosis and treatment by guidance counselors, school psychologists, social workers and psychiatrists. The instructional services are generally provided to groups of about 10 students with an emphasis on individualized instruction. The clinical and guidance professionals generally deal with students on an individual basis.

The teachers and other professionals engaged in the City's nonpublic school program are, with the exception of some physicians under special contract, regular salaried employees of the Board who have applied for such assignments. Religion is not a factor in the assignment. Determination of which nonpublic schools a teacher or other professional shall serve is made by the administrators of the City's Bureau of Nonpublic School Reimbursable Services. The amount of time that a particular teacher or other professional will spend at any one nonpublic school is determined by the number of students eligible for the Title I program and the needs of such

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levels of students in grades one through twelve who are reading one or more years below their grade level.

(b) The reading skills center program provides more intensive remedial reading instruction for students in grades four through eight whose reading achievement levels are as much as five years below grade level.

(c) The remedial mathematics program offers remedial instruction to students in grades one through twelve whose scores on standardized tests show them to be six months or more below grade level in mathematics.

(d) The English as a second language program is designed primarily for very young children or students who have recently arrived in the United States. That program provides basic instruction in the English language, with emphasis on oral proficiency, to enable the students to achieve the competency and fluency in the English language which is necessary for them to participate effectively in regular instructional programs.

students. During the 1981-82 school year, some 78% of all Title I teachers and other professionals spent less than five days a week in the same public school and worked in more than one; children in 180 of the 231 nonpublic schools with Title I services received these from itinerant teachers; all non-teacher professionals were itinerant. Affidavits of a considerable number of teachers demonstrate that a large majority work in nonpublic schools with religious affiliations different from their own.

Instructions issued to the teachers and other professionals by the Bureau of Nonpublic School Reimbursable Services emphasize their accountability to their Title I supervisor and their nonaccountability to any nonpublic school official. They are solely responsible for the selection of students for the program and are to take all necessary steps to assure that materials and equipment provided for Title I activities are used only therein. They are not to engage in team-teaching or other cooperative instructional activities with nonpublic school teachers, to become involved with religious activities of the nonpublic schools or to introduce any "religious matter" into their teaching. While it is deemed necessary for the Title I teacher to confer with the regular classroom teachers of the nonpublic schools concerning the students' needs and progress in that classroom environment, the Title I teachers are instructed to confine these consultations to mutual professional concerns about the students' educational needs and not to engage in any discussion of matters of a religious nature.

The Title I teachers and other professionals are subject to the supervision of field supervisors, each of whom is ordinarily responsible for 22 Title I teachers and attempts to make at least one unannounced visit per month. The field supervisors are in turn supervised by program coor-

dinators. While they too make occasional unannounced visits, a principal method of carrying out their responsibilities is through monthly in-service training sessions, frequently held on days when the public schools are in session but the nonpublic schools are observing a religious holiday. Defendants emphasize the absence of any recorded complaint by a Title I teacher of interference by nonpublic school authorities or of any reports by supervisors that teachers have engaged in religious activity.

Teaching materials and equipment used in the Title I program are selected by City employees. The teaching materials are not to duplicate materials used in regular classroom instruction or to have any religious content. All such equipment and materials are labeled as property of the Board for use in the Title I program, are locked in storage and filing cabinets when not in use and are subject to an annual inventory.

Before approving the assignment of Title I teachers or other professionals to a nonpublic school, an administrator of the Board's Office of Special Projects informs the principal of applicable federal, state and local guidelines, including the requirement that any room used for Title I instruction or support service be free of religious symbols and artifacts. Nonpublic schools with children receiving Title I instructional services "typically" reserve a classroom for the exclusive use of Title I teachers. The clinical and guidance professionals customarily use the nurse's room or a comparable facility. Defendants assert broadly that "[n]one of the nonpublic school facilities used for Title I remedial instruction or support services contains any religious statues, symbols, pictures or artifacts."

Administrative contacts between the Board's Office of Special Projects and nonpublic school officials are said to be of a routine character, falling into three general catego-

ries—the Board's dissemination of information, its processing of requests for services by the nonpublic schools, and its annually requesting information needed for a survey of the workings of the program. While there have been criticisms of nonpublic school principals by the Board and *vice versa*, none of them has turned on matters of religion.

Defendants' statement of the facts concerning the operation of the Title I program in nonpublic schools may be summarized by quoting an observation from a 1971 report by the United States Office of Education: "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." *United States Office of Education (USOE) Program Guide No. 44* (1968), *reproduced in Title I ESEA, Participation of Private School Children, A Handbook for State and Local Officials*, U.S. Department of Health, Education and Welfare, Publication No. (OE) 72-62, p. 8 (1971).

DISCUSSION

1) *The Supreme Court's decisions with respect to government aid to religious schools*

Although the briefs have included a generous sampling of the Supreme Court's decisions in regard to the Establishment Clause, there are a sufficient number dealing with the problem of government aid to religious schools and, indeed, with the very problem here presented—the sending of public school teachers and other professionals into such schools to engage in remedial teaching and to provide clinical and guidance services—that we think it

best to confine ourselves largely to these decisions, with particular emphasis on the latter. In a field that has been so thoroughly ploughed by the Supreme Court, the function of an inferior federal court is not to make an independent interpretation of the constitutional text or to engage in creative distinctions but to do its best to follow what the Court has said. We have thought it necessary to analyze the Court's relevant pronouncements at some length, and generally in chronological order, since our reading of many of them differs materially from that of the three-judge court in *PEARL*, *supra*, 489 F. Supp. 1248.

The starting point of modern Establishment Clause jurisprudence on state aid to parochial schools is *Everson v. Board of Education*, 330 U.S. 1 (1947). There, after a thorough exposition of the history and purpose of the Establishment Clause by Justice Black, a bare majority of the Court held that the clause was not violated by a state's spending tax-raised funds to reimburse parents of parochial school pupils for their children's bus fares as part of a general program under which it paid the fares of pupils attending public and other non-profit schools; Justice Black thought that such action "approache[d] the verge" of the state's constitutional power, 330 U.S. at 16. Four Justices, in two eloquent dissents by Justices Jackson and Rutledge, believed it went over the verge.

A score of years later, the Court moved the verge a considerable distance in *Board of Education v. Allen*, 392 U.S. 236 (1968), where it sustained a New York law requiring local public school authorities to lend textbooks free of charge to all students in grades 7 to 12, including those in private schools. Justice White placed some emphasis on the fact that "[b]ooks are furnished at the request of the pupil and ownership remains, at least

technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-44. Justice Black dissented, finding a basic distinction between the provision of transportation, lunches, and police and fire protection, and the lending of textbooks, 392 U.S. at 252-53. Justices Douglas and Fortas also filed dissents.

The Court returned to the subject in *Lemon v. Kurtzman* and its companion case, *Earley v. DiCenso*, 403 U.S. 602 (1971). Chief Justice Burger pointed out, as had Justice Rutledge in his dissent in *Everson*, that the Establishment Clause prohibits not simply the establishment of a state church but any law "respecting" an establishment of religion, and that "[a] given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U.S. at 612 (emphasis in original). He continued, in what has become an oft-quoted passage, 403 U.S. at 612-13:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

Excessive entanglement was found to exist in a Rhode Island statute providing for up to a 15% salary supplement to teachers in nonpublic schools in which the

average per-pupil expenditure on secular education was below the average in public schools, conditioned on the teachers' giving only courses offered in the public schools, using only materials used in the public schools and agreeing not to teach courses in religion. Excessive entanglement was found also in a Pennsylvania statute authorizing the state's "purchase" of certain "secular educational services" from nonpublic schools, such purchase being restricted to courses in specified subjects, with the textbooks and materials to be approved by the state and with no payment to be made for any course containing any subject matter reflecting religious teachings or the morals or forms of worship of any sect.[6]

The Court said, with respect to the Rhode Island statute, 403 U.S. at 619:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

The Pennsylvania statute suffered from the same defect, exacerbated by the fact that it provided state financial aid directly to the sectarian schools, an arrangement " 'pregnant with involvement' " between church and state. 403

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6 The decision in regard to the Pennsylvania statute led inexorably to summary affirmance in *Sanders v. Johnson*, 403 U.S. 955 (1971), *aff'g* 319 F. Supp. 421 (D. Conn. 1970), where the district court had invalidated a similar Connecticut statute.

U.S. at 622 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970)). The Court spoke also of "[a] broader base of entanglement" inherent in "the divisive political potential of these state programs", and said that this potential was aggravated "by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow", 403 U.S. at 622-23. The Chief Justice also pointedly remarked, 403 U.S. at 624-25:

> Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

On the same day as *Lemon*, the Court decided *Tilton v. Richardson*, 403 U.S. 672 (1972). A bare majority sustained, with one qualification, provisions of the Higher Education Facilities Act of 1963, which authorized federal grants to institutions of higher education, which the Court construed as including church-related institutions, for the construction of facilities other than those used for sectarian instruction, for religious worship, or primarily

in connection with the program of a school or department of divinity. The statutory restrictions were to be enforced by the Office of Education primarily by way of on-site inspections. This result, seemingly at odds with that in *Lemon*, rested in large part on the Court's conclusion, 403 U.S. at 685, that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." Quoting from *Walz v. Tax Commission*, 397 U.S 644, 671 (1970) (sustaining tax exemptions to religious organizations), the Court said that the "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age", whereas Congress might well have thought that college students were less impressionable and less susceptible to religious indoctrination. The Court noted that, by nature, "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines", and that "[m]any church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students", 403 U.S. at 686 (footnote omitted). The evidence showed that the four schools there in question, while governed by Catholic religious organizations and having predominantly Catholic faculties and student bodies, admitted non-Catholics as students and gave faculty appointments to non-Catholics. None required students to attend religious services and, although all four required students to take theology courses, the parties had stipulated that these were taught according to the academic requirements of the subject matter, covered a range of human religious experiences, and made no at-

tempt to indoctrinate students or to proselytize. Since religious indoctrination was not a substantial purpose or activity of these church-related colleges and universities, there was less likelihood than in primary and secondary schools that religion would permeate the area of secular education. The inspections "necessary to ascertain that the facilities are devoted to secular education" were therefore characterized as "minimal", 403 U.S. at 687. Emphasis was also placed on the fact that the Government was subsidizing buildings, not—as in *Lemon*—teachers, who "are not necessarily religiously neutral", and that the Government aid was "a one-time, single-purpose grant", 403 U.S. at 687-88. Finally, the Court observed that these factors, plus the diverse and widely dispersed student constituency of colleges and universities, also substantially lessened the potential for divisive religious fragmentation in the political arena.

Tilton was followed, again with respect to a college, by a differently composed Court, this time by a vote of 6-3, in *Hunt v. McNair*, 413 U.S. 734 (1973).[7] In contrast, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), decided the same day as *Hunt*, struck down three financial aid programs which New York had devised for nonpublic elementary and secondary schools. One program was an annual grant of $30 or $40 per student for maintenance and repair of facilities and equipment to ensure students' health, welfare and safety in schools serving a high concentration of low-income families, not, however, to exceed 50% of the average per-pupil cost of equivalent maintenance and

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[7] Justices Black and Harlan, the former of whom had dissented and the latter of whom had concurred in *Tilton*, had been succeeded by Justices Powell and Rehnquist, both of whom joined the majority in *Hunt*. Justices Douglas, Brennan and Marshall dissented in both cases.

repair services in the public schools. A second program reimbursed parents of children attending nonpublic elementary or secondary schools whose annual taxable income was less than $5,000, in amounts of $50 per grade school child and $100 per high school student so long as those amounts did not exceed 50% of tuition actually paid. The third program authorized income tax deductions, in amounts decreasing as gross income increased, for each dependent child in a nonpublic school for whom the parent had paid at least $50 in tuition. Justice Powell, writing for a majority, held that each of these programs violated *Lemon*'s "primary effect" test. Referring to *Everson*, *Allen*, and *Tilton*, he recognized that "some forms of aid may be channeled to the secular without providing direct aid to the sectarian", but characterized these cases as showing that "the channel is a narrow one." 413 U.S. at 775. While the holding that the programs had the impermissible primary effect of advancing religion made consideration of the entanglement issue unnecessary, Justice Powell felt prompted, 413 U.S. at 794,

> to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

He went on to say, much as the Chief Justice had done in *Lemon*, that

> we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the

> pressure for accelerated increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

413 U.S. at 797-98 (footnotes omitted). The Court followed *Nyquist* in two more cases decided that day. In *Sloan v. Lemon*, 413 U.S. 825 (1973), it invalidated a similar Pennsylvania tuition reimbursement scheme. In *Levett v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), in an opinion by the Chief Justice, it applied *Nyquist* to invalidate another New York program under which the state reimbursed nonpublic schools for certain costs of administering tests "mandated" by the state but prepared by the nonpublic schools; only Justice White dissented. A different view was later to be taken with respect to state-prepared tests, whether graded solely by the state, as in *Wolman v. Walter*, 433 U.S. 229 (1977), or in part by nonpublic school personnel, as in *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

It is with this background that we come to the four cases in which the Court has considered programs such as that here *sub judice*.

Wheeler v. Barrera, 417 U.S. 402 (1974), was the first case in which the Court gave plenary consideration to the application of Title I of the Act to parochial schools.[8] Parents of children attending nonpublic schools in the inner city area of Kansas City, Missouri, complained that the State Commissioner of Education and the Missouri Board of Education were violating Title I in that they were allocating money to Title I programs in public schools but not making "comparable" expenditures for children in parochial schools in the district. Although remedial teachers were employed in the public schools, the defendants had failed to send public school teachers into the parochial schools during regular hours on the grounds that this was forbidden under Missouri law and the First Amendment and that Title I did not so require. On the other hand, mobile educational services and equipment, visual aids, and educational radio and television had been provided, as had been teachers for after-school, weekend, and summer school classes, apparently

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8 We pass over the denial of certiorari, 409 U.S. 921 (1972), in *Nebraska State Board of Education v. School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161 (1972), in what might have been the Court's first encounter with the use of Title I funds in connection with a parochial school. Justice Douglas, joined by Justice Marshall, dissented from the denial of certiorari. Justice Brennan, who joined in denying the petition, filed an opinion pointing out the special facts involved. There were no available classrooms in the public schools but two were available in a parochial school. The school district proposed to lease these classrooms for instruction by public school teachers of *both* public and parochial school students. "Thus, the school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise." 409 U.S. at 926. That Justice Brennan did not consider his *Hartington* opinion as sanctioning the sending of public school teachers into parochial schools to give remedial instruction to pupils in those schools is made evident by his later opinions in *Meek* and *Wolman*, *infra*. The view of the three-judge court, 489 F. Supp. at 1264, that Justice Brennan's remarks in *Hartington* "are particularly relevant to the case at bar" affords some measure of the difference in our reading of the precedents.

held in the public schools but open to parochial school pupils. A divided court of appeals held that the defendants were in violation of the Act, *see* 475 F.2d 1338 (8 Cir. 1973).

The Court, in an opinion by Justice Blackmun, considered the case to present two issues: "First, whether Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students, and, second, whether that requirement, if it exists, contravenes the First Amendment." 417 U.S. at 415. The Court answered the first question by saying that Title I permitted but did not require such assignment. The Court declined to pass on the second issue since no order had been entered requiring "public school teachers paid with Title I funds [to be sent] into parochial schools to teach remedial courses", 417 U.S. at 426. The Court went on to say:

> Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of [on-premises] instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. *At this time we intimate no view as to the Establishment Clause effect of any particular program.*

Id. (emphasis supplied.)

We think *Wheeler* has little bearing on the present case. It shows only that a majority of the Court regarded the question of the constitutionality of sending public school teachers into parochial schools to perform Title I programs to be debatable, with Justice Douglas indicating a clear preference for a holding of unconstitutionality, Justice White indicating a clear preference for a holding of constitutionality, and Justice Powell voicing "serious misgivings" in regard to constitutionality.[9] The case does not stand for the proposition, intimated in *PEARL, supra*, 489 F. Supp. at 426, that programs like the one here at issue are to be judged by their *results*. The holding in *Wheeler* was simply that the Court would not decide an issue that had not been and might never be presented, with a statement that when and if it was, decision *might* "vary according to the precise contours of the plan that is formulated"; the Court was at pains to say that it "intimate[d] no view as to the Establishment Clause effect of any particular program." 417 U.S. at 426.

In fact, at that very time the Court had under advisement a case substantially raising the constitutional issue bypassed in *Wheeler* and decided it summarily on the side of unconstitutionality only a week later, *Public Funds for*

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9 Justice Powell, joining the Court's opinion, observed, 417 U.S. at 428:

> I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools. See *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

Justice White, also concurring, said, 417 U.S. at 429, that he was

> pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance nonsectarian instruction of students in private elementary and secondary schools.

Justice Douglas, dissenting, *id.*, thought the Court should have decided that none of the proposed forms of aid to parochial schools was constitutional.

Public Schools v. Marburger, 417 U.S. 961 (1974), *aff'g mem.* 358 F. Supp. 29 (D.N.J. 1973).[10] A New Jersey statute furnished State aid to the parents of nonpublic school students in amounts up to $10 per elementary school student and $20 per high school student as reimbursement for the cost of secular, nonideological textbooks, instructional materials and supplies. It also provided that the amount left from the total appropriation after the textbook reimbursement program was funded would be assigned directly to nonpublic schools, in proportion to their enrollments, to permit them to acquire secular supplies, equipment and "auxiliary services". The latter were defined in the New Jersey Administrative Code as "nonadministrative services provided by personnel other than regular classroom teachers, school librarians, principals or other supervisory personnel to students whose special needs are not met in a standard or regular school program." These were, typically, remedial and corrective instruction and diagnostic services in reading and mathemetics, corrective instruction in speech, adaptive or corrective instruction in physical education, guidance counseling and testing services, and psychological testing and diagnostic services. 358 F. Supp. at 39. Personnel providing such services were required to be employees of the board of education, to be certified by the State Board of Examiners if such certification was required of similar personnel assigned to public schools, and to be under the supervision of the local board of education. *Id.*

The three-judge court struck down the provision in regard to auxiliary services, as it did the other provisions

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10 The Chief Justice, Justice White and Justice Rehnquist would have noted probable jurisdiction and set the case for oral argument.

of New Jersey statute. Responding to defendants' argument that no entangling surveillance would be required because "the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic", the three-judge court emphasized that "a teacher who teaches reading or remedial reading remains a teacher" and that "[a] teacher's instruction may vary in content or emphasis and is not entirely predictable . . . . This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and nonideological subject matter." 358 F. Supp. at 40. The court further pointed out that the teachers would "be working in atmospheres dedicated to the rearing of children in a particular religious faith", and that "a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers." *Id.* The court also alluded to the potential-for-political-divisiveness argument which the Chief Justice had elaborated for the first time in *Lemon* and Justice Powell had repeated in *Nyquist*. We forbear further discussion of the summary affirmance in *Marburger* since much of the same ground was to be covered in the Supreme Court decision next discussed.

We come then to *Meek v. Pittenger*, 421 U.S. 349 (1975), the most pertinent to this case of all the Court's Establishment Clause decisions. In Part V of the plurality opinion, written by Justice Stewart for himself, Justice Blackmun and Justice Powell, and concurred in by Justice Brennan for himself, Justice Douglas and Justice

Marshall[11] over sharp dissents by Chief Justice Burger and Justice Rehnquist, the latter being joined by Justice White, the Court held unconstitutional a Pennsylvania statute, Act 194, which authorized the Secretary of Education to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements.[12] These included

> guidance, counseling and testing services; psychological services; services for exceptional children; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

The teaching and other services were to be provided in the nonpublic schools by personnel drawn from a division of the public school system that had been established to provide similar services to public school children. A divided three-judge district court, *see* 374 F. Supp. 639 (E.D. Pa. 1974), had sustained this against an attack on entanglement grounds on the basis that continuing supervision of the personnel providing auxiliary services would

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11 As shown by their votes in *Lemon*, *supra*, 413 U.S. 825, Justice Brennan and his two colleagues would have placed the Part V result of unconstitutionality on broader grounds.

12 *Meek* cannot be distinguished on the basis that the Pennsylvania statute provided auxiliary services only in nonpublic schools—a form of discrimination which all the Justices would surely have stricken down without saying more. The purpose of Act 194 was to provide children in nonpublic schools benefits similar to those already afforded in public schools, *see* 421 U.S. at 352 n.2.

not be necessary to guarantee that a member of the auxiliary-service staff had not "succumb[ed] to sectarianization of his or her professional work", 374 F. Supp. at 657. Justice Stewart began by finding that this was error, *see* 421 U.S. at 369-70, citing *Earley v. DiCenso*, the companion case to *Lemon v. Kurzman, supra*, 403 U.S. 602, which had held that a statute subsidizing the teaching of secular subjects by religious school teachers would "inevitably" require "comprehensive, discriminating, and continuing state surveillance" to insure that instruction would be religiously neutral. Justice Stewart saw no sufficient distinction in the fact that the Act 194 teachers would be dealing with remedial (and occasionally exceptional) students. "[T]he likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion' ", 421 U.S. at 370-71 (quoting *Earley v. DiCenso, supra*, 403 U.S. at 619). Even more important for us—indeed dispositive unless affected by a later decision—is the immediately following passage wherein the *Meek* majority refused to recognize any distinction from *Earley* and *Lemon* based on the fact that "the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work." This "does not substantially eliminate the need for continuing surveillance." While the auxiliary-service personnel were not subject to the discipline of a religious authority, they were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advance-

ment of religious belief is constantly maintained." It followed that "[t]o be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." 421 U.S. at 372. Also noting the potential-for-divisive-conflict theme that had been sounded in *Lemon, supra*, 403 U.S. at 622-23, and repeated in *Nyquist, supra*, 413 U.S. at 794, Justice Stewart concluded that

> [t]his potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and non-ideological when functioning in church-related schools . . . compels the conclusion that Act 194 violated the constitutional prohibition against laws "respecting an establishment of religion."

421 U.S. at 372.[13]

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13 Just as *Lemon* was to have its *Tilton*, *Nyquist* and *Meek* were to have *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). The Court there sustained a Maryland program of grants to private institutions of higher learning for each full-time student (excluding students enrolled in seminarian or theological academic programs) in an amount equal to 15% of the State's per-full-time-pupil appropriations for students in the state college system. The grant could be used for any purpose except that, as provided by an amendment to the statute, none of the money could be utilized for sectarian purposes. Justice Blackmun, writing for himself, the Chief Justice and Justice Powell, thought that *Lemon*'s primary effect test of was met by the district court's finding that the four colleges at issue were not "pervasively sectarian", 387 F. Supp. at 1293. This, in turn, was based on a number of subsidiary findings, summarized at 426 U.S. 755-58, which he declined to characterize as clearly erroneous. 426 U.S. at 758. He expected that in using the grant the colleges "will give a wide berth to 'specifically religious activity,' and thus minimize constitutional questions" regarding the advancement of religion. 426 U.S. at 760-61

The last of the four cases relating to government funding of auxiliary services for parochial school students

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(footnote omitted). Justice Blackmun had more difficulty with the entanglement hurdle. He surmounted this on three bases set forth at 426 U.S. 762-66. What he found "most impressive" in distinguishing *Lemon* was the following, 426 U.S. at 764-65:

> The elementary and secondary schooling in *Lemon I* came at an impressionable age; the aided schools were "under the general supervision" of the Roman Catholic diocese; each school had a local Catholic parish that assumed "ultimate financial responsibility" for it; the principals of the schools were usually appointed by church authorities; religion "pervade[d] the school system"; teachers were specificially instructed by the "Handbook of School Regulations" that " '[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area.' " 403 U.S., at 617-618. These things made impossible what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes.

Justices White and Rehnquist furnished the majority by reiterating and amplifying the views expressed in the former's dissent in *Lemon* and the latter's dissent in *Meek*. Justices Brennan and Marshall dissented on the grounds set forth in the former's separate opinion in *Lemon*. Justice Stewart's dissent made particular point of the fact that theology courses were a compulsory part of the curriculum and that the findings of the district court with respect to the nature of the instruction in those courses differed radically from those in *Tilton*, and the noncategorical nature of the grants; he also agreed with the views of Justices Brennan and Stevens. 426 U.S. at 773-75. The latter's dissent expressed agreement with Justice Brennan's views; he "would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it." 426 U.S. at 775.

For our purposes the most important thing about *Roemer* is Justice Blackmun's reaffirmation and explication of *Meek*. Referring to the portion of that opinion relating to "auxiliary services" ("remedial instruction, counseling and testing, and speech and hearing therapy"), he said, 426 U.S. at 754:

> These also were intended to be neutral and nonideological, and in fact were to be provided by public school teachers. Still, there was danger that the teachers, in such a sectarian setting, would allow religion to seep into their instruction. To attempt to prevent this from happening would excessively entangle the State in church affairs. The Court referred again to the danger of political divisiveness, heightened, as it had been in *Lemon I* and *Nyquist*, by the

is *Wolman v. Walter*, 433 U.S. 229 (1977). This dealt with an Ohio statute, Ohio Rev. Code Ann. § 3317.06 (Supp. 1976), providing a variety of forms of state aid to nonpublic elementary and secondary schools, most of which were sectarian. The statute was enacted after the decision in *Meek v. Pittenger* and was "obviously . . . an attempt to conform to the teachings of that decision", as the state acknowledged, 443 U.S. at 233. Our concern is with two portions of the Ohio law. Sections 3317.06 (D) and (F) authorized expenditure of state funds to supply speech and hearing diagnostic services and diagnostic psychological services to pupils attending nonpublic schools within the district, all to be provided in the nonpublic school by employees of the local board of education, or a physician hired thereby, with any treatment to take place off the nonpublic school premises. Sections 3317.06 (G), (H), (I) and (K) authorized expenditure of funds for certain therapeutic, guidance, and remedial services to help nonpublic school students who had been identified as needing specialized attention. These services were to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises.

Taking first the on-premises diagnostic services, Justice Blackmun began by agreeing with the finding of the district court that the danger that the diagnostic speech and hearing staff or the psychological diagnostician might

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necessity of annual legislative reconsideration of the aid appropriation. 421 U.S., at 372.

He added, *id.*:

> So the slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed, see *Meek v. Pittenger*, *supra*, or to expand them substantially, but merely to insure that they are faithfully applied in this case.

engage in the impermissible inculcation of religion was "insubstantial". 433 U.S. at 242. He perceived no sufficient basis for distinguishing these diagnostic services from the portions of the statute funding physician's, nursing, dental and optometric services in nonpublic schools—services of the sort that the Court had approved in *Lemon, supra,* 403 U.S. at 616-17, and which the *Wolman* plaintiffs had not challenged. He recognized the binding authority of *Meek* but distinguished the role of the diagnostician from that of the teacher or guidance counselor in that it "does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student." 433 U.S. at 244.

The plaintiffs' attack on the portions of the statute funding off-premises therapeutic services was limited to the situation in which such services were not provided to public and nonpublic school students simultaneously. This, plaintiffs contended, created a risk that sectarian pupils might be isolated and the public employees tempted to "tailor [their] approach to reflect and reinforce the ideological view of the sectarian school attended by the children", thereby directly aiding the sectarian institution. 433 U.S. at 246. Justice Blackmun answered by construing the statute, as had the district court, "to authorize services only on sites that are 'neither physically nor educationally identified with the functions of the nonpublic school' ", with the result that "the services are to be offered under circumstances that reflect their religious neutrality", 433 U.S. at 246-47—precisely the opposite of the situation here presented. He conceded that *Meek* had "acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and

advance religious beliefs in their activities." But he noted that the Court had emphasized in *Meek*

> that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school . . . . The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.

433 U.S. at 247. Accordingly, he held that "[s]o long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise", even when the students are exclusively sectarian pupils, since "[t]he influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution." *Id.* He added that there would be no excessive entanglement since "[i]t can hardly be said that the supervision of public employees performing public functions *on public property* creates an excessive entanglement between church and state." 433 U.S. at 248 (emphasis supplied).

Justice Blackmun's defense of the diagnostic and therapeutic provisions of the statute occupied, respectively, Parts V and VI of his opinion. The Chief Justice and Justices Stewart, Marshall, Powell and Stevens joined in Part V, relating to diagnostic services; the Chief Justice and Justices Stewart, Powell and Stevens joined in Part VI, relating to therapeutic services.[14] Justices White and

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[14] Justice Powell, concurring in these and other points of Justice Blackmun's opinion, filed a statement recognizing that "[o]ur decisions in this troubling area draw lines that often must seem arbitrary",

Rehnquist concurred in the judgment in these parts for the reasons stated by the former in *Nyquist* and by the latter in *Meek*. Justice Marshall would have denied the attack on diagnostic but would have sustained that on therapeutic services; Justice Brennan would have sustained the attacks on both. Hence there were five Justices who upheld government funding of therapeutic services for parochial school students only if these were provided in public facilities, and two who would have found even that to violate the Establishment Clause.

This analysis of the Court's decisions concerning public aid to religious school leads inescapably to the conclusion that public funds can be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises

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but adding that any loss of analytical tidiness seemed "entirely tolerable" in view of "the positive contributions of sectarian schools" and what he deemed the lessened dangers of "significant religious or denominational control over our democratic processes—or even of deep political division along religious lines. . . ." He characterized the Court's decisions as having "sought to establish principles that preserve the cherished safeguards of the Establishment Clause without resort to blind absolutism" and thought that "[m]ost of the Court's decision today", including Parts V and VI, "follows in that tradition." 433 U.S. at 262-63. We thus cannot subscribe to appellees' contention that Justice Powell was departing from the position he had taken in *Meek*.

Justice Stevens dissented from portions of the opinion that had sustained various parts of the statute. He expressed preference for abandoning the three-part test of *Lemon* and returning to Justice Black's shorter formulation in *Everson*, *supra*, 330 U.S. at 16. He conceded, however, that "[t]he State can plainly provide public health services to children attending nonpublic schools", and thought that "[t]he diagnostic and therapeutic services described in Parts V and VI of the Court's opinion may fall into this category". Hence, although having "some misgivings", he was "not prepared to hold this part of the statute invalid on its face." 433 U.S. at 266. Of course, the therapeutic services described in Part VI of the opinion were to be furnished only on public premises.

of the religious school. The Supreme Court's Establishment Clause jurisprudence from *Everson* to *Wolman* has been entirely consistent on the point that whatever forms of state aid may be given to religious elementary and secondary schools, these must not create a risk, sufficiently significant to require policing, that public school personnel will act, even unwittingly, to foster religion. Teachers and those who provide clinical and guidance services of the sort here at issue are engaged in occupations in which the performance of one's duties may be subtly and all too easily influenced by a sectarian milieu.[15] To be sufficiently certain that public employees, in a program like the present one, will maintain strict religious neutrality, they and the institutions in which they work must be subjected to "comprehensive, discriminating and continuing state surveillance", *Lemon v. Kurtzman, supra,* 403 U.S. at 619. This itself is a constitutionally excessive entanglement of church and state.[16]

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15 It is in the nature of ideological influence that it need not always involve the conscious participation of the person influenced. Accordingly, the recognition of the risk that teachers and other professionals will be affected by a sectarian milieu, expressed in *Meek* and in *Wolman*, does not presuppose "bad faith" on their part but simply fallibility and the consequent need for constant monitoring with its attendant entanglement. The statement in *Committee for Public Education & Religious Liberty v. Regan, supra,* 444 U.S. at 660-61, that the Court was unprepared to presume bad faith in order to find excessive entanglement therefore does not aid appellees. Moreover, the Court's statement of entanglement in *Regan* was in the context of a reimbursement program which it characterized as "straightforward and susceptible to . . . routinization", *id.*—a phrase that hardly describes the roles of teachers and other professionals under Title I.

16 The majority of the three-judge district court in *Meek* stated that, "[s]ignificantly, in no educational expenditure case decided on entanglement grounds has the Court ruled that the statute in question was facially unconstitutional . . .", and that "a decision on the entanglement criterion will in most if not all cases require a factual inquiry rather than a resort to examination of the face of the statute in

2) *Appellees' attempted distinction based on the working of New York City's plan*

Appellees' principal basis for urging us to sustain the validity of the program here at issue is that the position taken by the Court in *Meek*, as reaffirmed and refined in *Wolman*, must yield to the considerable evidence concerning the actual working of the City's provision of on-premises remedial instruction and guidance services. Analysis will show that this evidence, even if taken at face value, goes mainly to appellees' contention that New York City's plan has not advanced religion, and a complete and sufficient answer, as already pointed out, is that *Meek* did not rest on a conclusion that Act 194 had actually fostered religion but rather on a conclusion that, in order

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issue or to judicial notice about how it may be expected to operate." 374 F. Supp. 639, 650-51 (E.D. Pa. 1974). The Supreme Court, however, belied the district court's expectations. As stated by Justice Stewart, Pennsylvania's Act 194 was invalid because the state, "to be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, . . . would *have* to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that these restrictions were being followed." 421 U.S. at 372 (emphasis supplied; footnote omitted). This also answers the argument of the district judge in this case that the precedential weight of *Meek* is limited by the fact that the Court there struck down Act 194 soon after enactment, without a record concerning its actual operations like the extensive one here assembled. When the Court invalidates a program on account of "facial" unconstitutionality, as it in effect did in *Meek*, its decision rests on "the conclusion that the statute [can] *never* be applied in a valid manner", *City Council of Los Angeles v. Taxpayers for Vincent*, 52 U.S.L.W. 4594, 4597 (U.S. May 15, 1984 (emphasis supplied). The *Meek* Court was aware that programs having safeguards like the City's could be devised and might prove sufficient to prevent teachers and counselors from fostering religion; indeed the possibility of such programs had been suggested by Judge Gibbons writing for the majority of the three-judge court, *see* 374 F. Supp. at 657. The defect which the Court found fatal in *Meek* was not that Pennsylvania had not imposed supervision and other safeguards like New York City's, but that it would have to do precisely that and would thereby violate the entanglement principle.

to be sure that it would not, Pennsylvania would be required to monitor its operation so closely as to violate the entanglement test, and we place our decision on that ground without need to decide whether New York City's program fails *Lemon's* "primary effect" test. However, in the interest of completeness and in deference to the three-judge court in *PEARL* and the district judge here, we shall state other reasons for finding appellees' argument to be flawed.

First, as regards their contention that Title I has not fostered religion, appellees experience the difficulty always confronted by one having to prove a negative. Even if the evidence were still more extensive than it is, it could not dispel the possibility that in some significant number of instances a public school teacher has succumbed to, or indeed embraced, the religious influences that bear on anyone offering instruction or guidance in rooms that are part and parcel of a religious school, although religious symbols and artifacts have been removed therefrom.[17] The force of this consideration is heightened by the lack of any incentive for complaint. The nonpublic schools, which had to apply for Title I assistance, are happy to have it, even, perhaps all the more, if an occasional teacher or counselor has strayed into religious paths. Similar considerations apply to the students; they have chosen to have, or at least have become used to having, some degree of religious content in their instruction, and are unlikely to notice or to complain if some of this should find its way into the remedial classroom or counseling center. The same considerations apply to the

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17 In fact there can be no assurance that this is always done; at least when a room has not been permanently reserved for the public school teacher, there is always the possibility of a slip.

parents. Teachers and counselors will not complain of their own conduct even assuming they recognize, as they may not always do, that they have crossed the line. The visits of the Title I supervisors are sporadic and, while unannounced, are not unnoticed. Moreover, these visits do not disclose what goes on in the frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved. All these conferences are held in the religious school—just where does not clearly appear—and it is practically inconceivable that the general atmosphere of the school should not enter into them in any degree.[18] Greater certainty that these opportunities for influence will not lead to public employees' acting so as to foster religion can be achieved only by still greater supervision, but this would mean greater entanglement. This is the very point of the discussion in *Meek,* 421 U.S. at 369-70. Earlier decisions, notably *Earley v. DiCenso, supra,* had made it clear that, because "[t]he State must be *certain,* given the Religion Clauses, that subsidized teachers do not inculcate religion . . .", 403 U.S. at 619 (emphasis supplied), reliance could not be placed simply "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools", *Meek,* 421 U.S. at 369. Accordingly, there must be the active and extensive surveillance which the City has provided, and, under *Meek,* this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion.

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18 Plaintiffs-appellants point out that one of the evaluations of the City's plan said that "[a] team approach was used" in the discussion of individual cases. Joint Appendix at 274.

Second, in resisting the charge that Title I has led, or may lead, to a fostering of religion, the appellees' arguments too often invoke "mosts" and averages. Thus, we are told that there is little risk because 78% of all Title I teachers and other professionals spent less than five days a week in the same public school and worked in more than one. From the perspective of the Establishment Clause, however, it is more important that 22% did work five days a week in the same school, thereby becoming regular components of the religious school's teaching complement, with the special vulnerability to religious influence that this entails. We are likewise unmoved by the statistic that children in 180 of the 231 nonpublic schools receiving Title I services got them from itinerant teachers or professionals. The more significant statistic is that children in 51 nonpublic schools received remedial instruction from public school teachers who were regularly in such schools. Similarly, the fact that a large majority of the public school teachers and other professionals work in nonpublic schools with religious affiliations different from their own does not avoid the conclusion that many of them work—some five days a week—in schools having the same religious affiliation, with consequent enhancement of the danger that the religious atmosphere of the school will penetrate into the remedial instruction or other services.[19]

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19 It was doubtless for this reason that, as we read *Meek*, the Court renounced the possible distinction suggested but not endorsed in *Wheeler, supra*, 417 U.S. at 426, between a case in which "a former parochial school teacher is paid with Title I funds to teach full time in a parochial school" and one in which "a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." A large program will undoubtedly include teachers of both types.

Third, the whole basis of appellees' argument, namely, that no harm has been proved to have been done in the past is a fundamentally wrong approach to the problem of public aid to religious schools. There is no guarantee that what seems to have been an enlightened approach by the City and the Board to the administration of its plan for sending public school personnel into religious schools will continue. Yet taxpayers like these plaintiffs, who are interested in the preservation of the Establishment Clause and on whom and whose organizations the burden of enforcement in cases like these largely rests, cannot reasonably be expected to mount perpetual guard. In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. Justice Blackmun may have been unduly sanguine when he stated in *Roemer, supra*, 426 U.S. at 754, that "there is little room for further refinement of the principles governing public aid to church-affiliated public schools." But there could be no greater step away from the goal of reasonable certainty than to adopt a rule that the validity of a program should hinge on its precise workings from year to year.

Fourth, any breach of the principle of *Meek* that the line is to be drawn at sending public school teachers and other professionals into religious schools could have consequences going far beyond the program at issue here. We see no principled basis for limiting the position urged by appellees to remedial instruction or clinical and guidance services. One can readily think of other subjects—ranging

from chemistry, physics, and mathematics to physical education and arts and crafts—where it would be easy to devise courses as free of any obvious religious features as the types of instruction here involved, and whose delegation to public school teachers would not significantly affect the religious mission of the schools in the areas which they reserved for their own teachers.[20] The pressure to exploit this possibility would be immense. Apart from political considerations, the Court has long recognized that a combination of the understandable feelings of parents who are taxed to support the public schools, yet are forced by their religious convictions also to pay to send their children to religious schools, *cf. Lemon*, 403 U.S. at 622, and the fear of increased burden on the fisc if the religious schools should close, *cf. Nyquist*, 413 U.S. at 797, would produce unremitting efforts to exploit any hole that had been opened. To relax *Meek*'s ban on sending public school teachers and counselors into religious schools, a ban later recognized in *Roemer* and *Wolman*, on the basis of a demonstration that this has not advanced religion in the New York City schools, would let the genie out of the bottle.[21] Considerable segments of the

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20 We also see no principled basis for limitation in the facts that the programs here at issue are aimed at poor students and are available only when the school does not offer them—the latter of which any school could readily overcome. But even if such limitations had a principled basis under the Establishment Clause that we do not perceive, the potential for expansion would still be great.

21 Compare, in this connection, the "Shared Time" program described in *Americans United for Separation of Church & State v. School District of Grand Rapids*, 718 F.2d 1389 (6 Cir. 1983). Under Grand Rapids' program, the public school district leased classroom space in parochial schools for the purpose of offering courses from its general curriculum to nonpublic school students during regular school hours. Course titles included "Humanities, Language Arts, Home Economics, Science, Spanish, French, Latin, Business, Social Studies, Yearbook,

curriculum of the religious schools could be turned over to public school teachers, working in classrooms denuded of religious symbols and with "state inspectors prowling the halls of parochial schools and auditing classroom instruction," *Lemon v. Kurtzman*, 403 U.S. at 650 (opinion of Brennan, J.). It will not do to say that such an outcome cannot occur "while this Court sits", *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting), unless there is a principled basis on which the Court can impose a limit. The Court has thus wisely decided, as we read its cases, that whatever the situation may be with respect to other forms of government aid, no part of the teaching or counseling function in parochial schools can be performed by public school employees, whether under a good plan, a bad plan, or no plan at all.

Fifth, appellees' arguments ignore the symbolic significance of the regular appearance of public school teachers in religious schools. More than twenty years ago, the Court elucidated the "neutrality" test toward religion as stemming "from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Quite recently the Court has said, "the mere appearance of a joint exercise of legislative authority by

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Calculus, Creative Writing, Psychology, Journalism, Criminology, and Advanced Biology." 718 F.2d at 1392. The Sixth Circuit invalidated the program as violating the Establishment Clause; the Supreme Court has granted certiorari, 52 U.S.L.W. 3631 (Feb. 27, 1984).

Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 74 L. Ed. 2d 297, 306 (1982). Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public. Although the degree of public participation may thus far be minor, the potential for expansion is there.

3) *Appellees' argument that the City's religious schools are not predominantly religious*

Another distinction sought to be drawn by appellees is that the religious schools here in question are not of the same sort as those in *Meek*. In order to prevail on the entanglement issue on this basis, appellees would have to sustain the position that the schools are so nearly secular that significant surveillance is not required. No such position can be sustained.

The argument takes off from the fact that the complaint in *Meek* alleged that the schools there in question were of the sort described in the margin.[22] It is then

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22 [S]chools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial

urged, on the basis of affidavits of the Reverend Monsignor John J. Healy, Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York, the Reverend Vincent D. Breen, Superintendent of Education of the Roman Catholic Diocese of Brooklyn, the principals of two Hebrew day schools, and 42 public school teachers and other professionals working in parochial schools, that the schools here in question do not have all these characteristics. In effect appellees argue that all the religious schools here in question are like the four colleges in *Roemer, supra* note 13. The effort fails on both the facts and the law.

With respect to the facts, we take the affidavit of Monsignor Healy as making the most complete statement of appellees' position. Although the affidavit is persuasive that many, perhaps most, of the schools in the Archdiocese of New York receiving Title I assistance do not exhibit *all* the characteristics listed in the *Meek* complaint, a careful reading discloses that many of the schools have many of the characteristics and some may have all. Indeed, the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values.[23]

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or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

421 U.S. at 356. See also the rather similar list in the opinion of the three-judge court quoted in *Nyquist, supra*, 413 U.S. at 767-68.

23 While Monsignor Healy denied that the Title I Catholic and elementary schools in the Archdiocese impose religious restrictions on admissions, he conceded that in 41 schools receiving funds from the Archdiocesan Commission for Inter-Parish Financing, 90% of which are Title I schools, 84% of the students are Catholic. No claim was

As for the law, *Meek v. Pittenger* did not rest on a finding that the Pennsylvania religious schools possessed

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made that this simply reflected the religious proportion of the neighborhood. It reflected two other factors as well: the desires of Catholic parents and the preference in admissions given to their children. Similarly, although teachers are not restricted to Catholics, the most that Monsignor Healy could say by way of quantification was that "an inquiry of a random sample of Title I schools revealed that 15 non-Catholics were teaching in the schools contacted" out of an unstated number of total teaching positions, and that this was not the total number of non-Catholic teachers. Monsignor Healy also stated that 20% of a total of 359 lay teachers (no figures were given as to the non-lay teachers, who are members of religious orders) employed by Archdiocesan high schools are not Catholic. These figures show exactly what would be expected—that the regular teachers are overwhelmingly Catholics.

Monsignor Healy conceded that "[a] concern for religion and religious values has always been central to the Catholic philosophy of education" and that "the concern for religion and religious values . . . is central to the philosophy of Catholic schools", although he maintained that this "in no way dilutes or distorts the content of what would be considered secular, as opposed to religious education courses." The religious education in the schools "reflects a concern that students receive, in their normal educational setting, an exposure to the teachings of the Roman Catholic Church and Christianity in general," although it was asserted that none of the schools "compel[s]" its students to believe anything. Noting that the New York Catholic schools in *Nyquist* and *Levitt*, which, after all, included the very ones here involved, were said to have "as a substantial purpose the inculcation of religious values", *Nyquist*, 413 U.S. at 768, he objected to the connotation in the word "inculcate", which, in his view, suggested "an effort to induce students to accept ideas or values through coercion". He admitted, however, that "[o]ur schools have as a central concern that students be aware of Catholic values", although he added that students were intended to "examine these values critically." "The emphasis in the religious education classes in the overwhelming majority of the schools . . . is on the teachings of Christianity as the Roman Catholic Church formulates them," although "[n]o effort is made in the religious education courses . . . to *compel* any student to accept as valid or to adhere to the beliefs of the Roman Catholic Church" (emphasis supplied). The Archdiocesan schools require the attendance of pupils at "religious acitivities." These typically consist of a prayer at the beginning or end of the school day, but, "[i]n addition, during regular school hours on an occasional basis most schools will schedule more formal liturgical observances, such as attendance at Mass by a class or the entire school." While we thus accept Monsignor Healy's statement that the schools of the Archdiosese do not "compel obe-

all the characteristics alleged in the complaint. The divided three-judge court held the Pennsylvania programs to be valid even if all these allegations were true and therefore made no findings whether they were or not. The portion of Justice Stewart's opinion holding unconstitutional the provision in Act 195 for the loan of instructional materials and equipment referred to the "predominant[ly] sectarian character" of the nonpublic schools, "the primary, religion-oriented educational function of the sectarian school[s]", and "the predominantly religious role performed by *many* of Pennsylvania's church-related elementary and secondary schools", 421 U.S. at 364-65 (emphasis supplied). He also observed that "[t]he very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief", 421 U.S. at 366, and quoted with approval Justice Brennan's statement in *Lemon*, 403 U.S. at 616-17 (concurring opinion), that "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." A fair case could therefore be made, on the record before us, that government funding of the City's Title I program constitutes a direct and substantial

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dience to the doctrines and dogmas of the Roman Catholic Church" or otherwise "seek to coerce the conscience", this is by no means inconsistent with their having as their substantial purpose the "inculcation" of religious values, *see Nyquist, supra*, 413 U.S. at 768. To say that the schools "inculcate" such values is only to say that they earnestly seek to instill or implant them—which need not imply coercion. *Cf.* Webster's New International Dictionary 1261 (2d ed. 1959) (inculcate: "[t]o teach and impress by frequent repetitions or admonitions"). The fact that New York's Catholic schools do not try to compel students to espouse a particular creed hardly removes them from the class of institutions maintaining "an atmosphere dedicated to the advancement of religious belief", *Meek v. Pittenger, supra*, 421 U.S. at 371.

advancement of religious activity under the portion of *Meek* dealing with the loan of instructional materials and supplies.

However, as stated above, we need not go so far. When the Court struck down Act 194, relating to state provision of "auxiliary services", it relied on entanglement grounds. What mattered, therefore, was the risk that public employees would consciously or unconsciously foster religion, and the entangling prophylaxis that efforts to prevent this would entail. Hence it was enough that the teachers and other professionals employed under Act 194 were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. The facts (as opposed to the conclusions) presented in the affidavits offered by appellees bring the religious schools here at issue well within this characterization. It may be that the degree of sectarianism in Catholic schools in, for example, black neighborhoods, with considerable proportions of non-Catholic pupils and teachers, is relatively low; by the same token, in other schools it may be relatively high. Yet, as previously said, enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek, Meek* applies. It would be simply incredible, and the affidavits do not aver, that all, or almost all, New York City's parochial schools receiving Title I aid have, in Justice Brennan's words in *Lemon, supra*, abandoned "the religious mission that is the only reason for the schools' existence."

Beyond this, the kind of inquiry suggested by appellees is neither possible nor permissible. There is no indication that the City has ever made any inquiry into the precise

degree of religiosity of each of the religious schools into which Title I personnel are sent and it would be expecting altogether too much of these six plaintiffs or their counterparts in a subsequent case to do so. Furthermore, conditions change. One archbishop of New York or bishop of Brooklyn may be content to maintain an atmosphere only moderately dedicated to the advancement of religious belief; his successor may require more. For the City to maintain a constant watch on the religious content of the schools would constitute another aspect of the "entanglement" which the Establishment Clause forbids.

We recognize that the picture of the schools' secular character painted in the affidavits bears some resemblance to that of the religiously affiliated colleges that figured in *Roemer v. Maryland Public Works Board, supra* note 13, 426 U.S. 736, 755-56. The similarity, however, is far from complete, as a comparison with the schools described by Monsignor Healy makes clear. Although the Court held that they were not "pervasively sectarian" for purpose of *Lemon's* "primary effect" test, none of the four colleges in *Roemer* received funds from or made reports to the Catholic church; here some of the Catholic schools do receive such funds and all are under the supervision of the diocese. In *Roemer* attendance at Catholic religious exercises was not required; here it is. In *Roemer* there was no "actual college policy" of beginning the classes with prayer; here there is a uniform practice of beginning or ending the school day or a particular class with prayer. In *Roemer* the student bodies were "chosen without regard to religion"; here Catholics are preferred. Still more important are the differentiating factors with respect to entanglement. Here, as in *Lemon* but not in *Roemer,* we are dealing with elementary and

secondary schooling; the aided schools are under the general supervision of the Roman Catholic diocese; and each school has a local Catholic parish that assumes ultimate financial responsibility for it. According to the *Roemer* Court, these and other factors make "impossible what is crucial to nonentangling aid programs: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes", 426 U.S. at 765. See also *Tilton v. Richardson, supra,* 403 U.S. 672, 687 (finding only "minimal", nonentangling surveillance necessary in case of sectarian colleges which did not have religious indoctrination as their substantial purpose).

4) *Other arguments*

Finally we shall deal briefly with other arguments made by appellees, although the short answer to all of them is that they bear on the question of "primary effect", not on the entanglement issue which was central to the Court's decision in *Meek* and to our decision here.

Referring to the mention in many Supreme Court cases of a statute's benefitting a broad class of persons, appellees emphasize that the aid here in question is offered not simply to religious schools but to all schools and to many pupils, the great majority of them in the public schools. But in *Meek,* too, the plan in question benefitted a broad class of persons. As previously pointed out, Act 194 provided auxiliary services in nonpublic elementary and secondary schools, which services were to be of the same nature as those provided in the public schools. In any event, it cannot be of constitutional significance whether the state provides services in private schools to cover a type of expense already met in the general program of the

public schools or, as under Title I, provides services in both public and nonpublic schools.[24]

A second argument is that the Title I program affords aid to the children rather than the schools. This is subject to three answers, any one of them sufficient. The first is that the same argument could have been made in *Meek*. The second is that the aid here, to wit, the provision of teachers and other professionals, is furnished to the school on its application, although the ultimate beneficiary may be the student. The third is what the Court said in *Nyquist, supra,* 413 U.S. at 785-86, and in *Wolman, supra,* 433 U.S. at 250.

Finally, appellees, particularly relying on the recent decision in *Lynch v. Donnelly,* 52 U.S.L.W. 4317 (U.S. March 5, 1984), argue that Title I involves no unconstitutional advancement of religion because the Government's assuming the burden of remedial instruction in religious schools is only "indirect", "remote" or "incidental" advancement. But this argument again ignores that *Meek* did not rely on the second prong of the *Lemon* test, to wit, benefit to religion, but on the third, excessive entanglement.

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24 Appellees argue that the difference may be of constitutional significance in one respect, namely, the political divisiveness point first adumbrated by the Chief Justice in *Lemon*. Whereas in *Meek* there would be an annual battle over Pennsylvania's aiding the religious schools, here the aid is a small part of the aid afforded by Title I to both public and nonpublic schools throughout the United States, which in turn is a small part of the budget of the Department of Education. However, as we read *Meek*, the political strife argument was simply an additional consideration to bolster a conclusion already reached on other grounds, *see* 421 U.S. at 372. *Cf. Mueller v. Allen*, 77 L.Ed.2d 721, 733 n.11 (1983) (indicating political entanglement test is "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools"); *Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4321 (U.S. March 5, 1984) ("This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into political divisiveness is even called for . . . .").

CONCLUSION

As said by then District Judge Higginbotham, dissenting from the portion of the decision of the three-judge court in *Meek v. Pittenger, supra,* 374 F. Supp. 639, 663, which affirmed the constitutionality of Pennsylvania's provision of auxiliary services in religious schools, "there is a tugging appeal to one's humanitarian feelings and interest over the difficulties which will confront non-public schools" if New York City's long-standing plan for implementing Title I by sending remedial teachers and counselors into religious schools is invalidated. These schools may well be unwilling or unable to pay for such auxiliary services with their own resources. While other ways of using Title I funds for the benefit of students in religious schools can be found, these, as shown in *Wolman,* are almost certain to be less effective, more costly, or both. This is a hard case, and hard cases, like great cases, as Justice Holmes reminded us in *Northern Securities Company v. United States,* 193 U.S. 197, 400-01 (1904) (dissenting opinion), can make bad law. We fully understand and appreciate why the three-judge court in *PEARL* and the district judge here struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm.

However, efficiency was not the objective of the framers of the Bill of Rights; they aimed to restrain government from certain acts which legislative majorities had determined to be wise. *See Stanley v. Illinois,* 405 U.S. 645, 656 (1972) ("But the Constitution recognizes higher values than speed and efficiency."). Our task here, while difficult, is easier than was Judge Higginbotham's. He wrote before the Supreme Court had decided *Meek*; we

write thereafter. As we have repeatedly said, nothing in this extensive record shows that the surveillance under New York City's plan is signficantly different from that contemplated by the *Meek* Court, and we must reiterate that this portion of *Meek* was decided on the ground of entanglement, not aid to religion. We cannot escape the conviction that, despite the attempted distinctions, appellees are really asking us to say that *Meek* was wrongly decided—that the majority, although expressly addressing the issue, *see* 421 U.S. at 371, did not adequately appreciate the difference between the surveillance of religious school teachers condemned in *Lemon* and the surveillance of public school teachers in religious schools condemned in *Meek*. Whatever the merits of that argument may or may not be, we are nevertheless bound by the *Meek* decision, *see Hutto v. Davis,* 454 U.S. 370, 375 (1982). Moreover, we have identified some considerations beyond those discussed in *Meek* which seem to us to call for its result.[25]

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25 We are not unaware that, as Justice Blackmun avowed in *Committee for Public Education & Religious Liberty v. Regan, supra*, 444 U.S. at 663-64 (dissenting opinion), there are deep divisions within the Court with respect to issues such as those here presented and, as appellees have strongly suggested to us, that the composition of the Court has changed since *Meek*. One need not go beyond *Meek* itself to know that three present members of the Court would vote to affirm the judgment of the district court in this case if the issue of sending public school teachers and other professionals into sectarian schools to give remedial instruction and guidance were arising for the first time. It is not appropriate for us to speculate how these three Justices would vote now that *stare decisis* is a factor, see *Arizona v. Rumsey*, 52 U.S.L.W. 4665, 4667 (U.S. May 29, 1984), and cases there cited—and even less so for us to engage in prediction with respect to the others. In the one case known to us where an inferior court has refused to follow a Supreme Court precedent on the basis of prospective nose-counting, *Barnette v. West Virginia Board of Education*, 47 F. Supp. 251, 253 (S.D.W.Va. 1942)—in that instance successfully, see 319 U.S. 624 (1943)—the lower court had a solid basis for prediction which we do not. Our task is to analyze the precedents and apply them as best we can: The responsibility for modifying or overruling them, if that is to be done, rests elsewhere.

We therefore reverse the order of the district court granting summary judgment to appellees and direct it to enter judgment granting appellants' cross-motion for a judgment declaring that New York City's plan violates the Establishment Clause and an appropriate injunction. The district court should afford sufficient time for the City to propose and the Secretary to approve an alternative plan. For our part we shall stay the issuance of the mandate until thirty days after the final disposition of any timely petition for rehearing or suggestion for rehearing en banc, in order to enable appellees, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. § 1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 CV 1750
(ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE AND ALLEN H. ZELON, PLAINTIFFS,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, AND THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS,

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ AND BELINDA WILLIAMS, INTERVENOR-DEFENDANTS.

MEMORANDUM ORDER

This case presents another chapter in the ongoing saga concerning the constitutionality of provisions of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.* *See Flast* v. *Cohen*, 392 U.S. 83 (1968). Plaintiff taxpayers seek declaratory and injunctive relief upon the ground that Title I violates the Establishment Clause of the First Amendment to the United States Constitution. The case is before the Court upon cross-motions for summary judgment.

The case was stayed pending the final outcome of *National Coalition for Public Education and Religious*

Liberty v. *Harris (PEARL II)*, 489 F. Supp. 1248 (S.D.N.Y. 1980) (three-judge court), *appeal dismissed*, 449 U.S. 808 (1980). By stipulation of the parties, this case is to be determined upon the trial and record in *PEARL II*.[1] Thus, the Court has before it the exact same facts and evidence which persuaded the three-judge District Court in *PEARL II* to find Title I constitutional upon the basis of the record before it.

This Court has considered the thorough and lengthy unanimous decision of Judge Tenney in *PEARL II* and is of the opinion that it reaches the correct result for the reasons stated therein. Plaintiffs rely heavily upon language in *Meek* v. *Pittenger*, 421 U.S. 349, 367-73 (1975); however, they do not respond to Judge Tenney's numerous and accurate observations about the factual distinctions between the two cases. Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program in New York City's schools was not before the courts in *Meek*. As a result, the conclusions reached therein were reasonable inferences drawn from the circumstances.

In the case at bar, however, although arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demonstrates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly,the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconsti-

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[1] Plaintiffs' memorandum in support of their motion adopts the *PEARL II* court's statement of facts as its own; therefore, there appears to be no dispute about the accuracy of the *PEARL II* court's findings.

tutional governmental activity inherent in the arrangements of this program. Therefore, the Court finds that defendants have sustained their burden of demonstrating that Title I, as administered in the nonpublic schools of New York City, does not offend the Establishment Clause of the First Amendment. Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

SO ORDERED.

The Clerk of Court is directed to enter judgment in favor of defendants dismissing the complaint. The Clerk is further directed to forward copies of this Memorandum Order to counsel for the parties.

/s/ Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
October 4, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 78-1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE AND ALLEN H. ZELON, PLAINTIFFS,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, AND THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS,

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ AND BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

Judgment
Filed Oct. 20, 1983

A memorandum order of Honorable Edward R. Neaher, United States District Judge, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment, and directing the Clerk of Court to enter judgment in favor of defendants dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants; that the defendants' motion for summary judgment is granted; that the plaintiffs' motion for summary judgment is denied; and that judg-

ment is entered in favor of defendants dismissing the complaint.

/s/ Robert C. Heinemann

ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
October 17, 1983

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., PLAINTIFFS,

-against-

PATRICIA R. HARRIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., DEFENDANTS,

-and-

JAMES AND BESSIE BOVIS, ET AL., INTERVENOR-DEFENDANTS,

-and-

PHILIP AND IDA FENSTER, ET AL., INTERVENOR-DEFENDANTS.

OPINION

THREE-JUDGE COURT

ELLSWORTH A. VAN GRAAFEILAND, C.J.
CHARLES H. TENNEY, D.J.
VINCENT L. BRODERICK, D.J.

TENNEY, D. J.

The constitutional prohibition against government aid to parochial schools[1] has provoked considerable litiga-

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[1] Throughout this opinion the term "parochial school" will be used interchangeably with "nonpublic" or "private school." While the latter, of course, may be either secular or sectarian,

tion resulting in an array of not entirely harmonious judicial decisions.[2] This Establishment Clause challenge to Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as amended, 20 U.S.C. §§ 2701 *et seq.* ("Title I"), was launched over twenty years ago and, at that time, culminated in the landmark decision of *Flast* v. *Cohen*, 392 U.S. 83 (1968). The same day that *Flast* established that a taxpayer had standing to assert this First Amendment claim, the Supreme Court upheld a New York law requiring local public school authorities to lend textbooks free of charge to parochial school students. *Board of Education* v. *Allen*, 392 U.S. 236 (1968). Confronted with this unfavorable precedent and an apparently unsympathetic Court, the opponents of Title I decided to postpone pursuit of their claim. The legal landscape has now changed and the challenge has been renewed. The National Coalition for Public Education and Religious Liberty ("PEARL") has brought this suit against the Secretary of Health, Education and Welfare, the United States Commissioner of Education, and the Chancellor of the New York City Board of Education to enjoin the allocation and use of Title I funds for the remedial education of parochial school students by public school teachers on the premises of the parochial schools during regular school hours.

Since *Flast* and *Allen* were decided, two developments have occurred that are decisive in the resolution

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this opinion is concerned solely with nonpublic schools that are affiliated with a particular religious organization or group. For the sake of brevity, therefore, the religious orientation of a nonpublic or private school will generally be presumed.

[2] *See Committee for Public Education* v. *Regan*, 48 U.S.L.W. 4168, 4175 (U.S., February 20, 1980) (Stevens, J., dissenting); *Wolman* v. *Walter*, 433 U.S. 229, 251 n.18 (1977); *Wheeler* v. *Barrera*, 417 U.S. 402, 431 (1974) (Douglas, J., dissenting); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 761 n.5 (1973).

of this lawsuit. First, a series of Supreme Court decisions have clarified in part the precise concerns underlying the First Amendment's prohibition against the establishment of religion. Second, New York City has been running Title I programs for about fourteen years and has accumulated an extensive record of operations that can be examined and evaluated. Upon viewing this record in light of the considerations embodied in the Establishment Clause, this Court has concluded that Title I, as interpreted and applied in New York City, does not violate the First Amendment of the Constitution.

Procedural Background

After this lawsuit was filed, the Court granted motions to intervene as defendants that were made by certain parents of children who attend parochial schools in New York and who receive remedial educational assistance under Title I. A three-judge court was convened to hear and decide the case pursuant to 28 U.S.C. § 2282.[3]

Plaintiffs then moved for summary judgment or, in the alternative, for a preliminary injunction. Relying on *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J.) (three-judge court), *aff'd mem.*, 417 U.S. 961 (1974), discussed *infra*, the plaintiffs asserted that the Supreme Court twice "has faced the constitutional question raised in this case, and in both instances it has ruled the challenged statute unconstitutional on its face." Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 2. The Court denied both motions. *National Coalition for Public Education and*

[3] This action was commenced by a complaint filed February 25, 1976 and is therefore unaffected by the repeal of the three-judge court provision. Act of August 12, 1976, Pub. L. No. 94-381, § 7, 90 Stat. 1120.

Religious Liberty v. *Califano*, 446 F. Supp. 193, 196 (S.D.N.Y. 1978). Not only did the plaintiffs fail to show the threat of irreparable injury that is a prerequisite to preliminary injunctive relief, but, as noted by the Court, an order halting the remedial education program in the middle of the year would work an unwarranted hardship on the defendants and would harm the public interest. *Id.* at 195. The Court also rejected PEARL's summary judgment argument for two reasons.

> First, the plaintiffs' challenge is *not* to this statute on its face: rather, they challenge Title I only "insofar as [it] authorizes the expenditure of federal funds to finance educational services within religious schools during school hours." Notice of Motion ¶ 3. The limited nature of this challenge to a particular application of the statute necessarily demands that this Court be fully informed on the exact manner in which these Title I funds are used, in order both that the Court may understand and evaluate the alleged constitutional improprieties of this use of Title I funds and that the Court may shape a suitable injunctive order should such improprieties be found.
>
> Second, as the Supreme Court has noted,
>
> > The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts. . . .
>
> *Wheeler* v. *Barrera*, 417 U.S. 402, 426-27, 94 S. Ct. 2274, 2288 (citations omitted). In evaluating a first amendment challenge, a court must examine, *inter alia*, whether "the statute and *its administration* [avoid] excessive entanglement with reli-

> gion." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 358, 93 S. Ct. at 1760 (emphasis added). Such an examination is not possible on the current record.

Id. at 196.

An evidentiary hearing was conducted in May 1979. Plaintiffs called only one witness, Dr. John Ellis, Executive Deputy Commissioner for Educational Programs in the United States Office of Education. Plaintiffs' counsel stated that he was seeking to determine how the federal government interprets and administers Title I and proceeded to ask Dr. Ellis a series of primarily hypothetical questions based on prior Supreme Court decisions. Tr. 40-65. Pursuant to an agreement reached at a pretrial conference, the defendants presented the bulk of their case in the form of a narrative summary which was received into evidence. Defendants' Exh. T. This summary synthesized numerous affidavits, Defendants' Exh. U, Tabs A-1 to A-58, and documentary evidence, Defendants' Exhs. A-S, which described the operation of New York City's Title I program in nonpublic schools. The defendants also called seven witnesses who were teachers or administrators in the program.

At the start of the evidentiary hearing, plaintiffs' counsel stated that PEARL had no evidence showing that New York City's Title I program was unconstitutional. Tr. 8. Counsel explained that PEARL had sought to discontinue the suit against the City because "proof of such a [constitutional] violation and the financing of a trial record is beyond our means." *Id.* at 7-8. The City, however, had rejected PEARL's discontinuance offer.[4] The plaintiffs therefore asked the Court to

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[4] Counsel for New York City stated at the hearing that the City opposed the plaintiffs' "concession of judgment in this case and ... if we had not been named as a party in this case we would move to intervene." Tr. 37-38. In describing the City's interest in seeing the program continued in its present form,

enter judgment in favor of the City and allow the case to go forward against the two federal officials. The Court did not grant the request and plaintiffs conceded that "there is no violation in respect to any school within the City of New York and we ask no relief against the City of New York." *Id.* at 8.

Towards the end of the hearing, plaintiffs' counsel stated that "[o]ur basic premise is the statute on its face as construed by the Commissioner of Education is unconstitutional irrespective what happens in any school anywhere in the United States." *Id.* at 159. He then agreed with the Court's characterization of PEARL's argument as being "[n]ot that the statute itself is unconstitutional but [that it] is being unconstitutionally interpreted and applied." *Id.* at 60. Plaintiffs' counsel reaffirmed this position at the post-trial oral argument before the three-judge panel, P-Tr. at 17,[5] and reiterated his view that the case was unaffected by the lack of proof that New York City's Title I program violated the Constitution. *Id.* at 11.

The Court rejects plaintiffs' contention that "the issue in this case is not what is actually done; the issue in this case is what is authorized by the law which we are challenging." *Id.* at 11-12. This assertion is directly contradicted by the admonition of the *Wheeler* Court, quoted above, that a federal court must not issue decisions based on hypothetical situations. *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 427. In *Wheeler*, the Supreme Court specifically declined to rule on the constitutionality of a Title I program that provided remedial services on the premises of parochial schools because it would be "wholly inappropriate" to render an opinion "when no specific plan is before us." *Id.* at 426. Obvi-

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counsel remarked that "[i]t is not necessary for me to recount the cost to the City of educational deprivation." *Id.* at 38.

[5] "P-Tr." signifies the transcript of the post-trial oral argument held before this three-judge Court on December 14, 1979.

ously, it would be highly inappropriate for this Court to reject the exhaustive evidence that has been presented on New York City's Title I program and to resolve this suit on the basis of the plaintiffs' evidence about what *could* happen under the law. Accordingly, the factual summary and legal analysis that follows relies on the undisputed evidence submitted on the implementation of Title I in New York City schools. The Court's constitutional ruling is, of course, confined to the fact situation specifically presented here.

FACTUAL BACKGROUND

Title I

Title I was enacted in 1965 to provide federal funding for compensatory educational programs that are administered by local public educational agencies and are directed to educationally deprived children in low-income areas. Recognizing the significant correlation between poverty and learning deficiencies, Congress "declare[d] it to be the policy of the United States to provide financial assistance ... to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means ... which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 2071, *see* S. Rep. No. 146, 89th Congress, 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1450. The Act provides for annual congressional appropriations for programs proposed by local educational agencies ("LEA") and approved by state educational agencies. 20 U.S.C. § 2731. All programs are administered solely by the LEA in the particular area and are staffed entirely with the LEA's employees. 20 U.S.C. § 2734(m); 45 C.F.R. §§ 116.42, 116a.23(f). In order to be eligible for Title I funds, a program must satisfy certain statutory criteria that are designed to assure that the Act's purposes are advanced. For example, Title I funds may

be provided only to children who meet the dual eligibility requirement of (1) educational deprivation, defined as below age-level performance and (2) residence in an area designated by the LEA, in accordance with Title I regulations, as having a high concentration of children from low-income families. *Id.* §§ 2722, 2732-2734. Federal financing is available only for programs that will supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds. *Id.* §§ 2734 (f), 2736(c).

Participation in Title I programs is not limited to children enrolled in public schools. The Act provides:

> To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.... Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

20 U.S.C. § 2740(a) (emphasis added). Title I regulations require that each LEA provide services designed to meet the needs of educationally deprived children who attend private schools. 45 C.F.R. § 116a.23. These children must be given "genuine opportunities to participate," and the types of services to be provided shall be determined "on a basis comparable to that used in providing for the participation of public school children." *Id.*

As noted by the Supreme Court, Congress anticipated that "one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction." *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 422; *see* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1457; 111 Cong. Rec. 5747-48 (1965) (remarks of Congressman Goodell, Carey and Perkins). Federal and local officials administering the statute have adhered to the view that services directed to nonpublic school children may be provided on the premises of the nonpublic institution. *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 421-23; 45 C.F.R. § 116a.23(f); Affidavit of Genevieve Dane, Program Operations Branch Chief in HEW's Division of Education for Disadvantaged, sworn to April 20, 1979 ("Dane Aff."), ¶ 11; Affidavit of Lawrence F. Larkin, Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Education, sworn to April 17, 1979 ("Larkin Aff."), ¶ 9.

Title I regulations impose restrictions on the services provided on the premises of the nonpublic schools to assure that the programs remain secular both in content and setting. Public school personnel may provide instruction on nonpublic school premises only to the extent necessary to make such special services available to those educationally deprived children for whom the Title I program was designed. 45 C.F.R. § 116a.23(f). These services may be provided to eligible students only if they are not otherwise provided by the nonpublic school. *Id.* Title I funds may not be used to pay the salaries of private school teachers or employees, except for services performed outside their regular hours of duty under public supervision and control. *Id.* The LEA must maintain exclusive direction and control over all Title I services and funds, wherever provided; no public funds can be disbursed to the schools. *Id.*

§ 116.42. If any equipment or materials are used in a private school's Title I program, the LEA must maintain title to and physical control of the property and must remove it from the premises if necessary to prevent its being used for any purpose other than the Title I program. *Id.*

If a state or locality fails to comply with Title I requirements pertaining to the approval of local projects, disbursements of funds, or program supervision, the federal government must terminate or suspend Title I funding. 20 U.S.C. § 2836(a); 45 C.F.R. § 116.20. The statute provides, however, that in the event an LEA "is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required [by the Act], the Commissioner [of Education] shall waive the requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of [the Act]." 20 U.S.C. § 2740(b)(1). This provision reflects Congress's intent "that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds." *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 417. If the LEA is prohibited by state or local law from providing for the "equitable" participation of private school students in Title I programs, the Commissioner waives the statutory requirement that the state assure such participation and "bypasses" local authorities by arranging for the direct provision of services to eligible private school children. 20 U.S.C. § 2740(b)(2). In Missouri, for example, state law prohibits the provision of Title I services on the premises of nonpublic schools during regular school hours. The United States Office of Education conducted a study in 1976 to determine the manner in which Title I services were being provided to nonpublic school children in four Missouri cities. The study concluded that

the services provided at times other than during the normal school day were not comparable in quality, scope, and opportunity for participation to services provided during regular school hours. Affidavit of Joseph J. Vopelak, Acting Chief of the Institutional Services Section, Program Support Branch, in HEW's Division of Education for the Disadvantaged, sworn to April 20, 1979 ("Vopelak Aff."), ¶ 14. On the basis of this study, the Commissioner of Education directed that Title I services be provided directly to nonpublic school children in those four districts. *Id.* ¶ 16. Initial determinations of noncomparability have been made with respect to more than fifty other Missouri districts. *Id.*[6]

Title I is the largest single federally funded education program in the United States. During the 1979-1980 school year, services will be provided to approximately 4,800,000 public school children and 200,000 private school children across the nation. Dane Aff. ¶ 3. About 4 percent of the projected budget, or $105,200,000, will be spent on services for private school children. *Id.*

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[6] In 1970, parents of children enrolled in nonpublic schools filed a class action alleging that the state had arbitrarily and illegally deprived their children of services to which they were entitled under Title I. While remedial instruction was available in public schools during regular hours, such services were not provided at the parochial schools during the school day. This action resulted in the Supreme Court's decision in *Wheeler* v. *Barrera*, *supra*. The Court held that "the State is not obligated by Title I to provide on-the-premises instruction" because "comparable," not "identical" programs are mandated by the statute. 402 U.S. at 419. In remanding the case, the Court declined to rule on the Establishment Clause issue present in the case because no specific plan involving the placement of public school teachers in parochial schools was before the Court. The Court recognized, however, that this option was available to the state in implementing the Court's order on remand. *Id.* at 401.

New York City's Title I program

The New York City Board of Education ("Board") is responsible for administering the largest program of Title I remedial educational services in the United States. During the 1978-1979 school year, a total of 404,686 public and non-public school students were eligible for Title I services. Larkin Aff. ¶ 34. Of that total, 33,285, or 8.2 percent, were enrolled in nonpublic schools. *Id.* ¶ 35. Because of budgetary and logistical limitations, however, only 13,265 of the eligible nonpublic school students were expected to receive Title I services during that year. *Id.*

In New York City, Title I remedial services are provided directly on the premises of the nonpublic schools during regular school hours. The Board adopted this arrangement only after experimenting with alternative programs. During the first academic year that Title I funds were available, the Board attempted to provide services to private school students after regular school hours on the premises of both the private and public schools. The results of this experiment, however, were quite discouraging. *Id.* ¶ 135. Attendance was poor, students were inattentive, teachers were tired, and parents were concerned about the safety of children leaving school late in the afternoon. *Id.* ¶ 136. A suggested alternative to providing services at the nonpublic schools during the school day was to offer instruction to nonpublic school students at public schools during regular school hours. However, serious questions were raised about the constitutionality, under Article XI of the New York State Constitution, of allowing parochial school students to participate with public school students in programs conducted during regular school hours at the public school. *Id.* ¶ 138(a); Defendants' Exh. L at 3 (Statement by Board on Title I Proposals, August 31, 1966). Upon considering these le-

gal problems and the difficulties created by an after-hours program, the Board decided to establish Title I programs on the premises of nonpublic schools during regular school hours. Larkin Aff. ¶ 138; Defendants' Exh. L at 3. In adopting this arrangement, the Board was cognizant of the need to maintain the secular integrity of the program. The Board thus stated that it

> will provide the following services for educationally disadvantaged children in non-public schools, on their premises, during the school day: remedial reading, remedial arithmetic, speech therapy, and guidance counselling. The instruction will be given by peripatetic teachers, who will go from one school to another during particular periods; no teacher will be so assigned without his consent. The instruction will not duplicate any of the regular class-room work of the schools involved. Speech improvement instruction, for example, as distinguished from speech therapy (for stammering and other speech impediments), has been eliminated from the proposals as being too close to regular class-room work. Library services for non-public schools have likewise been eliminated as being outside the limited areas of remedial and therapeutic, and as constituting services to institutions more directly than to children.

Defendants' Exh. L at 3.

During the 1977-1978 school year, the Bureau of Nonpublic School Reimbursable Services analyzed the costs that would be incurred if the Title I program for nonpublic school students were to be conducted at sites other than the nonpublic schools. That analysis revealed that annual transportation costs plus other non-instructional expenses would amount to more than $4.2 million which, for the 1977-1978 academic year, was more than 42 percent of the total budget for the private school Title I program. Larkin Aff. ¶¶ 148, 152; Defendants' Exh. N (Analysis of Differences in Costs and

Services For On-Premises and Off-Premises Services To Nonpublic School Pupils During the Regular School Day). The reduction in staff that would be required to meet those additional costs would result in the elimination of services to 5,039 students, 36 percent of those who received Title I services during the 1977-1978 year. Larkin Af. ¶ 153.

The vast majority of nonpublic school students in New York City who are eligible for and actually receive Title I remedial services attend schools that are affiliated with one of several religious denominations. Board statistics show that approximately 87 percent of these students are enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and Diocese of Brooklyn. *Id.* ¶ 156. An additional 9 percent of the Title I students attend Hebrew Day Schools. *Id.*

Five types of remedial services are provided to nonpublic school children who satisfy Title I eligibility criteria: remedial reading, reading skills instruction, remedial mathematics, English as a second language, and clinical and guidance services. *Id.* ¶ 39. These services are provided by teachers and support staff who are employed by the Board and subject solely to its supervision and control. *Id.* ¶ 52. Title I teachers generally provide instruction to small groups of students and work with no more than 100 students in a week. *Id.* ¶ 49. The clinical and guidance professionals provide diagnostic testing, consultation and counseling services on an individual basis to children who are having difficulty benefiting from the Title I remedial program. *Id.* ¶¶ 47, 48.

Assignment to a nonpublic school Title I program is purely voluntary, and any teacher may refuse appointment to the program without losing seniority. *Id.* ¶ 54. Parochial school officials have no voice in the initial assignment of a Title I teacher or professional, and there is no known instance of any official or teacher re-

questing reassignment on religious grounds. *Id.* ¶¶ 56, 57. No inquiry is made into a staff person's religious affiliation or beliefs; therefore this has no bearing on appointment to a nonpublic school. *Id.* ¶ 55. Although the Board maintains no record of religious affiliations, the affidavits of Title I teachers submitted in this action demonstrate that most of them work in parochial schools with religious affiliations different from their own. *Id.* ¶¶ 55, 72. The vast majority of teachers are itinerant and spend less than five days a week at the same nonpublic school. *Id.* ¶ 60.

Each teacher and support professional assigned to a nonpublic school is given a detailed set of written instructions, as well as a series of oral instructions, that delineate his responsibilities and the restrictions imposed on his activities. *Id.* ¶¶ 62, 63. These guidelines emphasize that Title I personnel are independent public school employees who "do not service the entire school" and who have ultimate control over the selection of students for participation in the program. *Id.* ¶ ¶ 64, 65; Defendants' Exh. F at 130 (Board of Education Orientation Procedures for Nonpublic School Title I Programs). Teachers are instructed that they are not to engage in team teaching or cooperative instructional activities, although they may discuss a student's needs and progress with their counterparts on the parochial school faculty. Larkin Aff. ¶ 68. Title I personnel are also directed not to introduce any religious topics into the curriculum or become involved in the religious aspects of the school. *Id.* ¶ 69. Periodic evaluations and direct program supervision assure that Title I staff members comply with the Board's guidelines and restrictions. *Id.* ¶ ¶ 73-85.

Title I teachers in nonpublic schools occupy classrooms that are specifically designated solely for that purpose and that are free from any religious symbols, pictures, or statutes. *Id.* ¶ ¶ 103, 105. None of the ma-

terials used in any Title I program has any religious content. *Id.* ¶ 91. The Board retains title to and administrative control over all Title I property, and a comprehensive record keeping and inventory system guards against any diversion or misuse of equipment and materials. *Id.* ¶ 92. Title I teachers are instructed that when materials and supplies are not being used they should be secured, preferably in locked cabinets provided for that purpose. *Id.* ¶ 95. In compliance with the statute and its regulations, no Title I funds are paid to nonpublic schools to finance the salaries of regular classroom teachers, to construct facilities, or to reimburse the schools for any costs they incur in providing space for Title I programs. *Id.* ¶ 99.

The Establishment Clause

Declining to rule on the constitutionality of a "hypothetical" Title I program conducted on the premises of a parochial school, the Supreme Court declared that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 426. The Court stated, for example, that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." *Id.* The latter fact pattern described in *Wheeler* is now before this Court.

Resolution of this issue requires application of the tripartite Establishment Clause test established by the Supreme Court.

> First, the statute must have a secular legislative purpose. *E.g.*, *Epperson* v. *Arkansas*, 393 U.S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. *E.g.*, *School District of Abington Township* v. *Schempp*, 374

> U.S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. *E.g.*, *Walz* v. *Tax Comm'n*, 397 U.S. 664.

Meek v. *Pittenger*, *supra*, 421 U.S. at 358. Although easily and frequently recited, the test is not a precise formula, for "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1970). The Court should not engage in a "legalistic minuet in which precise rules and forms must govern," for "[a] true minuet is a matter of pure form and style, the observance of which is itself the substantive end." *Id.* As directed by the Supreme Court, "[h]ere we examine the form of the relationship for the light that it casts on the substance." *Id.*

1. Secular Legislative Purpose

In considering legislative purpose, the Court must look to the statement of intent contained in the legislation itself, or to the legislative history. It must also look to the legitimate government interest in providing assistance to nonpublic schools and their students. In this regard, it is noteworthy that the Supreme Court has never invalidated an educational aid statute on the express ground that its purpose was the advancement of religion. *See*, *e.g.*, *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977); *Meek* v. *Pittenger*, *supra*, 421 U.S. at 363, 368; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971); *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 613.

The legislative history of Title I clearly demonstrates that the purpose of the statute was to give aid to needy children regardless of where they attend school. *See* 20 U.S.C. § 2071; S. Rep. No. 146, 89th Congress, 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad.

News 1446, 1450. The government has a legitimate interest in providing remedial aid to private school students. Plaintiffs do not suggest that the enactment of Title I was motivated by an impermissible congressional purpose or design. Title I clearly serves a secular legislative purpose, and the statute satisfies the first prong of the three-part test.

2. Primary Effect

"Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973). The Establishment Clause precedents that guide this Court reflect a clear distinction between programs that provide aid directly to nonpublic parochial school students and those that either in form or substance provide direct assistance to the parochial schools themselves. This line was first drawn in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), in which the Court upheld the use of public funds to pay the bus fares of parochial school students. This arrangement was part of a general program under which the state paid the bus fares of all students attending public and nonpublic schools. According to the Court, the state contributed no money to the private schools, but merely helped children get to and from whatever school they attended. *Id.* at 17-18. Similar reasoning was employed in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), in upholding the constitutionality of a state statute authorizing textbook loans to children in public and private schools. The Court stated that "no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools." *Id.* at 244. Comparable textbook loan programs were subsequently approved by the

Court in *Wolman* v. *Walter*, *supra*, 433 U.S. at 238, and *Meek* v. *Pittenger*, *supra*, 421 U.S. at 362. The Court has also affirmed a district court decision that upheld a state statute authorizing financial assistance to a broad class of needy students in public and nonpublic colleages. *American United for Separation of Church and State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *summarily aff'd*, 434 U.S. 803 (1977). Although the district court discussed Supreme Court decisions drawing constitutional distinctions between higher and lower levels of sectarian education,[7] the court relied primarily on the "child benefit" principles of *Everson* and *Allen*. Ultimately, the aid program was upheld because "the emphasis . . . [was] on the student rather than the institution, and . . . no one religion [was] favored by the program, nor [were] private or religious institutions favored over public-institutions." *Id.* at 104.

Statutes providing aid directly to parochial institutions were struck down in *Committee for Public Education* v. *Nyquist*, *supra*, and *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973). *Nyquist* involved, in part, a "maintenance and repair" provision authorizing grants to nonpublic schools without effective restrictions on the ways in which the funds could be used. The Court ruled that the inevitable effect of the grants was to "subsidize and advance the religious

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[7] *Compare Hunt* v. *McNair*, *supra*, and *Tilton* v. *Richardson*, *supra*, *with Levitt* v. *Committee for Public Education*, *supra*, and *Lemon* v. *Kurtzman*, *supra*. The Court has consistently found the religiously affiliated institutions in the college aid cases not to be pervasively sectarian, while so characterizing parochial elementary and secondary schools. *See* discussion *infra*. The Court has indicated, however, that aid to a pervasively sectarian college may be constitutionally suspect. *Tilton* v. *Richardson*, *supra*, 403 U.S. at 682. Since *Blanton* involved colleges of this kind, 433 F. Supp. at 100, the court apparently relied on the fact that the aid flowed to the students and not to the institutions.

mission of sectarian schools." 413 U.S. at 780. The statute invalidated in *Levitt* authorized direct payments to private schools for expenses incurred in connection with testing, maintenance of enrollment records, maintenance of pupil health records, and recording of personnel qualifications and characteristics. Holding that the statute had the primary effect of advancing religion, the Court started that that aid provided for secular functions was not "identifiable and separable" from assistance to sectarian activities. 413 U.S. at 480.

The mere identity of the party receiving government aid is not necessarily dispositive in determining whether a statute primarily advances religion. In *Nyquist* and *Sloan* v. *Lemon*, 413 U.S. 825 (1973), the court invalidated state statutes that provided tuition reimbursements and tax relief to parents of parochial school children. The Court looked beyond the formal recipient of the aid and found that its effect was to provide financial support for sectarian institutions. *Id.* at 832. And just as aid purportedly directed to students or parents may be impermissible, assistance provided directed to the institution may survive judicial scrutiny. For example, in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the Supreme Court rejected a primary effect challenge to a federal statute that authorized direct grants to institutions of higher education for academic facilities. The Act permitted grants to sectarian schools, but only for facilities that would be used for a defined secular propose, and expressly prohibited the use of the facilities for any religious activities.[8] Similarly, in *Hunt* v. *McNair*, *supra*, the Court upheld a state statute that provided financial assistance to insti-

[8] The Court invalidated, however, a statutory provision that imposed a twenty-year limitation on the federal government's right to recapture a portion of the facility's present value if any of the statutory restrictions were violated. 403 U.S. at 683-84.

tutions of higher education engaged in the construction of buildings and facilities. The Court relied, in part, on statutory restrictions prohibiting use of the facilities for religious activities and noted that the Baptist College involved in the case was not a "pervasively sectarian" institution. 413 U.S. at 743-44. The Court has recently upheld a state statute authorizing public funds to reimburse church-sponsored and secular nonpublic schools for expenses incurred in complying with certain state-mandated requirements pertaining to testing, reporting, and record keeping. *Committee for Public Education* v. *Regan*, 48 U.S.L.W. 4168 (U.S., February 20, 1980). In contrast to the statute previously invalidated in *Levitt* v. *Committee for Public Education*, *supra*, this provision covered only state-prepared tests—not those prepared by the private school teachers and established an auditing system to monitor the use of state funds. Relying on these distinctions, the Court upheld the statute on the grounds that the nonpublic schools had no control over the tests; the nonpublic school teachers who graded the objective, multiple-choice exams had no control over the results; and the law provided ample safeguards against excessive or misdirected reimbursement. Cases such as *Regan*, *Hunt* and *Tilton* reveal that under certain circumstances, the government may furnish funds or services directly to a sectarian institution if their use is effectively restricted to nonreligious functions and activities.

Title I clearly adheres to the child benefit principle established in *Everson* and *Allen*. The student aid program established by the statute is religiously neutral and is potentially available to all needy children regardless of where they attend school. As required by the statute, Title I services are provided "on an equitable basis" to public and private school children. 20 U.S.C. § 2740(b)(2). During 1978, for example, nationwide expenditures for nonpublic school students accounted for

only four percent of the total fiscal year appropriation for Title I. Dane Aff. ¶ 3. In New York, about eight percent of Title I funds was budgeted for private school children. Larkin Aff. ¶ 35. Fewer than one-fourth of the nonpublic schools in the City have Title I programs conducted on their premises. *Id.* Services are provided to eligible nonpublic school students on the premises of their schools during regular school hours because that is the location "where the needs of the children can best be served," 45 C.F.R. § 116a.19(c), and where these students can receive services that are "comparable" to those provided in public schools, *id.* § 116a.23(c).

Unlike the direct institutional aid statutes invalidated in *Nyquist* and *Levitt*, Title I funds and services do not flow to the parochial schools. Nor are the students merely the formal recipients of the aid. The program is therefore not comparable to a tuition reimbursement or tax break offered only to parents of private school students because it does not relieve the schools' financial burdens or supply funds free from use limitations and is not limited to a small class of beneficiaries. *Cf. Sloan* v. *Lemon*, *supra*, 413 U.S. at 832 (invalidating state-sponsored tuition reimbursement for parents of children in nonpbulic schools, regardless of income level, as financial support for religious institution); *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 783, 791 (invalidating tuition reimbursement and tax relief for parents of students in nonpublic schools as constituting "a charge made upon the state for the purpose of religious education"). In the words of the Supreme Court, "the legislative aim of Title I was to provide needed assistance to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 406 (emphasis in original). In short, neither the statute nor the programs it has engendered constitute a vehicle for advancing religious education.

The parochial schools whose students receive Title I services may reap some incidental benefits from the program. The Supreme Court, however, "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its resources on religious ends." *Hunt* v. *McNair, supra*, 413 U.S. at 713. In fact, Title I funds cannot be used for services that would supplant programs that would otherwise have been available in the absence of federal funds. 20 U.S.C. § 2736(c); 45 C.F.R. § 116.40. Statutory regulations also insure that Title I materials and equipment will not be used to benefit the parochial schools where services are provided. 45 C.F.R. § 116.24(a); Larkin Aff. ¶¶ 92-98. The incidental benefits that may inure to a parochial school where Title I services are provided are insufficient to render the statute unconstitutional. *See Hunt* v. *McNair, supra*, 413 U.S. at 742.

Title I's adherence to the child benefit principle does not, however, make the statute automatically immune from a primary effects challenge. Neither *Everson* nor *Allen* provides a "per se immunity" from judicial examination of the "substance" of a government aid program. *Committee for Public Eduation* v. *Nyquist, supra*, 413 U.S. at 781. In subsequent decisions the Court has carefully pointed out the special characteristics of the government assistance provided in those cases.

> In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly empha-

> sized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses.

Id. at 781-82 (citations omitted), *quoted in Wolman* v. *Walter*, *supra*, 433 U.S. at 251 n.18.

The *Wolman* Court upheld the use of public school employees to provide on-premises diagnostic services and off-premises therapeutic services to nonpublic school students. According to the Court, diagnostic services, unlike teaching or counseling, have little or no educational content, are not associated with the school's eductional mission, and would not be subject to religious pressure or influence. *Id.* at 244. Because the diagnostician has only limited contact with the student, there is less opportunity for the transmission of religious views. *Id.* The Court acknowledged that the therapist who provides guidance and remedial services may establish a more substantial and long-term relationship with the student through which religious views could be conveyed. *Id.* at 247. Yet the Court concluded that the danger of religious advancement does not arise if the services are provided at religiously neutral locations, for it is "the pervasively sectarian atmosphere of the church-related school" that created environmental pressures capable of "alter[ing] the [public school employee's] behavior from its normal course." *Id.* In the view of the *Wolman* Court, the ideological pressures generated by the pervasive sectarian atmosphere of a religious institution are qualitatively greater, and therefore constitutionally different, than the minimal influence on a teacher's behavior that may result from merely teaching a student enrolled in a parochial school. Furthermore, the nature of the student-teacher interaction and the location where it occurs were apparently more important to the Court than whether the student or the school was the direct recipient of the aid;

simple conformity to the child benefit standard does not assure constitutionality.

The Supreme Court has repeatedly declared that "[w]hether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 370, *quoted in NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).[9] In contrast to *Everson*, *Allen*, and *Regan*, the case at bar involves government aid in the form of ongoing educational instruction that cannot be screened in advance for ideological content. "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable but a teacher's handling of a subject is not." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 617 (invalidating, in part, state-subsidized salary supplement for nonpublic school teachers who teach only secular courses). And unlike the government-sponsored diagnostic services upheld in *Wolman*, Title I provides continuous remedial instruction that entails more than minimal teacher-student contact.

Title I services are comparable to the off-premises therapeutic and remedial services approved by the *Wolman* Court. Yet in that case, the Court relied on the grounds that the use of a religiously neutral site negated the danger of religious advancement.

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[9] The Supreme Court's decision in *Meek*, which in part invalidated the provision of "auxiliary services" on the premises of nonpublic schools, is critical to the resolution of the issue in this case. That case is discussed more extensively in section 3, the "excessive entanglement" portion of this Opinion, because the Court ruled on entanglement grounds. 421 U.S. at 369, 372. Of course the *Meek* Court was also concerned about the program's potential for impermissibly advancing religion, id. at 370-72, and another section of the statute challenged in *Meek* was invalidated on that ground, *id.* at 363, 366.

The question before this Court is whether the apparent differences between Title I and the programs upheld in *Everson*, *Allen*, *Regan*, and *Wolman* render this statute as applied unconstitutional. The Court concludes that they do not. The determination that Title I as applied does not have a primary effect that advances religion is based, in part, on: the characteristics of the parochial schools where services are provided; the regulations restricting the activities of Title I teachers and the use of Title I materials; and, most importantly, the substantial evidentiary record compiled in this case that demonstrates to the Court's satisfaction that the program has remained free from religious influences and has not promoted the religious mission of the nonpublic schools.

In describing the "primary effect" prohibited by the establishment Clause, the Supreme Court has referred to aid flowing to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt* v. *McNair*, *supra*, 413 U.S. at 743. The profile of a "pervasively sectarian school" has been described in several Supreme Court cases. *See*, *e.g.*, *Meek* v. *Pittenger*, *supra*, 421 U.S. at 356; *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 767-68; *Levitt* v. *Committee for Public Education*, *supra*, 413 U.S. at 476. Typically, such schools:

> (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculca-

> tion of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

Meek v. *Pittenger*, *supra*, 421 U.S. at 356. According to the Court, "the potential for impermissible fostering of religion" arises when public employees perform "important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id.* at 371-72.

This description of a hypothetical, pervasively sectarian institution was relied upon by plaintiffs' counsel in questioning Dr. Ellis, the Executive Deputy Commissioner for Educational Programs, at the trial in this case. Counsel sought to establish that the federal government interpreted and applied Title I to authorize government assistance to students who attended nonpublic schools that fit the pervasively sectarian profile. Tr. 42-60. As discussed above, this line of questioning missed the mark, for the court cannot rule on the basis of even well-founded hypotheticals in the absence of evidence concerning a concrete program. In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the court upheld direct federal grants to four colleges with religious affiliations. Holding that none was pervasively sectarian, a plurality of the Court stated that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." *Id.* at 682. This Court, therefore, must evaluate Title I with respect to the New York City program on the basis of the evidence presented in this case.

The record before the Court includes uncontroverted evidence from administrators of Catholic and Hebrew Day schools where Title I services are provided that

demonstrates that these institutions do not have the characteristics of the pervasively sectarian schools described by the Supreme Court. The evidence shows that these nonpublic schools (1) do not restrict the admission of students on religious grounds, Affidavit of Reverend Monsignor John J. Healy, sworn to March 22, 1979 ("Healy Aff."), ¶¶27-30; Affidavit of Reverend Vincent D. Breen, sworn to March 22, 1979 ("Breen Aff."), ¶¶ 20-25; Affidavit of Rose Fogel, sworn to April 16, 1979 ("Fogel Aff."), ¶ 7; Affidavit of Rabbi David Rogoff, sworn to April 15, 1979 ("Rogoff Aff."), ¶ 7; (2) do not restrict the hiring of teachers on religious grounds, Healy Aff. ¶¶ 32-35; Fogel Aff. ¶ 10; Rogoff Aff. ¶ 9; (3) do not attempt to compel their students to accept or obey the doctrines of the sponsoring church or religious organization, Healy aff. ¶¶ 21-26; Breen Aff. ¶¶ 35-37; Fogel Aff. ¶ 7; Rogoff Aff. ¶ 7; (4) offer separate programs of secular and religious instruction and do not impose religious restrictions on the content of the instruction offered, Healy Aff. ¶¶ 36-47; Breen Aff. ¶¶ 26-29; Fogel Aff. ¶¶ 8, 9; Rogoff Aff. ¶ 8. Furthermore, the numerous affidavits of Title I teachers and professionals show that these public employees do not perceive a "dominant sectarian mission" and have not been subject to religious pressures or influences in the parochial schools in which they work. *See, e.g.*, Affidavit of Gail Meisel, sworn to April 12, 1979, ¶ 23; Affidavit of Susan Seidler, sworn to April 5, 1979, ¶ 19; Affidavit of Carol Almour, sworn to April 5, 1979, ¶ 18; Affidavit of Anna Marie Carrillo, sworn to March 27, 1979, ¶ 19; Affidavit of Fran Levy, sworn to March 27, 1979, ¶ 19. New York City's use of public school teachers on private school premises does not, therefore, create the same degree of potential for religious advancement that the *Meek* Court feared would result from placing public employees in pervasively sectarian institutions. *See Hunt* v. *McNair*, *supra*, 413 U.S. at

743-44 (rejecting primary effect challenge to state aid to college that could not be deemed pervasively sectarian; although trustees were elected by state Baptist Convention, whose approval was required for certain financial transactions and all charter amendments, no religious restrictions were imposed on faculty membership or student admissions).

The distinctions between the New York City schools where Title I services are provided and the pervasively sectarian schools described in *Meek* and other cases does not, however, ensure that the Title I program will not promote religion. The Supreme Court's opinion in *Wolman* v. *Walter*, *supra*, demonstrates that even government aid to a religiously affiliated, but not pervasively sectarian, private school can have this unconstitutional effect. The schools involved in *Wolman* did not restrict the admission of students or the hiring of teachers on religious grounds, did not require pupils who were not members of the sponsoring church to attend religion classes, and did not require teachers to teach religious doctrine as part of the secular courses taught in the school. 433 U.S. at 234-35. Yet the *Wolman* Court indicated that these characteristics were not sufficient to distinguish that case from prior decisions. *Id.* at 235 & n.4, 249-51. Furthermore, the Court upheld the provision of remedial and therapeutic services because "[s]o long as these types of services are offered at *truly religiously neutral locations*, the danger perceived in *Meek* does not arise." *Id.* at 247 (emphasis added). Finally, a provision authorizing the loan to students or their parents of instructional materials and equipment "incapable of diversion to religious use" was invalidated in *Wolman* because, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." *Id.* at 248-50.

Divorcing the secular function from the sectarian is not impossible with respect to the educational services provided by Title I. The equipment and materials stored at nonpublic schools are used exclusively for Title I instruction and are secured in Title I classrooms when not being used by public school employees. Title I teachers are well aware of the regulations restricting their own activities and the use of Title I materials. The *Wolman* Court rejected the argument that the loan provision should be upheld because materials were loaned to parents and students and not to the private schools. According to the Court, it would "exalt form over substance" to treat this arrangement any differently than a previously invalidated provision authorizing direct loans of materials to the nonpublic schools. *Id.* at 250. In contrast to either of these arrangements, Title I is a true student aid program, not merely a vehicle for channeling assistance to private institutions. Although the Supreme Court has refused to extend to other items the presumption of neutrality applied to textbooks, *id.* at 252 n.18, the evidence presented here demonstrates that Title I materials and equipment are not diverted from their intended use and do not promote any religious activity. In short, the publicly owned instructional materials do not support the collective educational enterprise of the parochial school.

In *Wolman*, the "religiously neutral locations" where private school students received remedial services were "neither physically nor educationally identified with the functions of the nonpublic school." *Id.* at 246-47, *quoting Wolman* v. *Essex*, 417 F. Supp. 1113, 1123 (S.D. Ohio 1976), *aff'd in part, rev'd in part sub nom. Wolman* v. *Walter*, *supra*. In New York City, Title I services are provided on the premises of parochial schools, typically in classrooms set aside for that purpose. Although physically unified, secular and sectarian instruction remain educationally distinct. Title I class-

rooms are free from religious symbols, contain separate materials and equipment, and are run solely by public school employees who are not subject to the supervision of private school administrators. Title I teachers and supervisors develop their own curricula, and no lessons have any religious or ideological content.

In certain respects, this arrangement resembles a situation depicted by Justice Brennan in an opinion concurring with the Court's denial of certiorari in the case of *Nebraska State Board of Education* v. *School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied*, 409 U.S 921 (1972). In *Hartington*, the Nebraska Supreme Court upheld a Title I grant proposal that involved the use of public funds to lease two unused classrooms in a Catholic High school that would be used for remedial education courses for public and private school students. Under the lease, the school district had full and exclusive control over the classrooms and the remedial instruction; no religious objects or pictures remained in the rooms. Justice Brennan, who is generally not sympathetic to government programs assisting religious institutions,[10] found the plan perfectly acceptable.

> There is not the slightest suggestion that this was a subterfuge to make a subsidy to the parochial school, or anything except an arrangement motivated solely by the lack of space in the public schools. Thus, the school district would have no

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[10] For example, Justice Brennan dissented from the Supreme Court's recent opinion upholding the use of public funds to reimburse church-sponsored private schools for expenses incurred in performing various services mandated by the state. *Committee for Public Education* v. *Regan*, *supra*, 48 U.S.L.W. at 4173 (Blackmun, J., dissenting in an opinion joined by Justices Brennan and Marshall). He also dissented from that portion of the Court's opinion in *Meek* v. *Pittenger*, *supra*, that upheld the loan of textbooks to nonpublic school children. 421 U.S. at 373 (Brennan, J., dissenting).

> part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration.... I have heretofore expressed my view that the First Amendment does not render unconstitutional "every vestige, however slight, of cooperation or accommodation between religion and government." *Abington School District* v. *Schempp*, 374 U.S. 203, 294 (1963) (concurring opinion). The accommodation involved in this case would not trespass beyond permissible bounds.

409 U.S. at 925-26. Justice Brennan's remarks are particularly relevant to the case at bar. The abundant evidence presented in this action demonstrates uniform compliance with the extensive Title I regulations establishing a well defined dichotomy between purely secular instruction and activities subject to religious influences. *See generally* Larkin Aff. ¶¶ 85, 98, 105.

This evidentiary record is a critical feature distinguishing this case from prior decisions relied upon by the plaintiffs. The Supreme Court has repeatedly warned that the placement of public school teachers in parochial schools, unlike the provision of textbooks or school buses, creates a danger that "religious doctrine will become intertwined with secular instruction," *Meek* v. *Pittenger*, *supra*, 421 U.S. at 370, *quoted in NLRB* v. *Catholic Bishop of Chicago*, *supra*, 440 U.S. at 501, because the "pressures of the environment might alter [the teachers'] behavior from its normal course," *Wolman* v. *Walter*, *supra*, 433 U.S. at 247. Even the "diminished probability of impermissible conduct is not sufficient" to ensure constitutionality. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 371. Yet in these cases where the Court spoke in terms of potential dangers or probabilities, the program or statute at issue was chal-

lenged shortly after enactment and evidence concerning its operation was scarce. *See, e.g., Wolman* v. *Walter, supra*, 433 U.S. at 233; *Meek* v. *Pittenger, supra*, 421 U.S. at 352; *Levitt* v. *Committee for Public Education, supra*, 413 U.S. at 474.

New York City has been providing Title I services in nonpublic schools for fourteen years. The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services. The evidence establishes that the result feared in other cases has not materialized in the City's Title I program. The presumption—that the "relgious mission" will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case.

The Court will not conjure up hypothetical situations in the face of a fourteen year record. *See Wheeler* v. *Barrera, supra*, 417 U.S. at 401-02. On the basis of all the evidence presented, the Court concludes that the risk of religious advancement has not been realized and New York City's Title I program does not have an unconstitutional primary effect.

3. Excessive Entanglement

The Court now turns to the final prong of the tripartite Establishment Clause test. To satisfy this third element, Title I must avoid "excessive entanglement" between the government and religious institutions. While recognizing that some interaction is inevitable, the Supreme Court has sought to prevent the intrusion of either into the realm of the other. As stated by the Court, "[t]he test is inescapably one of degree." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 674 (1970).

The plaintiffs contend that the issue in this case was resolved by the Supreme Court's decision on entanglement grounds in *Meek* v. *Pittenger*, *supra*, and its summary affirmance of the district court opinion in *Public Funds for Public Schools* v. *Marburger*, *supra*.[11] The defendants, in turn, assert that "[t]he central issue in this case is whether an on-premises Title I program gives rise to the same excessive administrative and political entanglement that doomed the auxiliary services program in Meek." Post-Trial Brief of Intervenor-Defendants James and Bessie Bovis at 39. Although this characterization of the case unduly slights the primary effect issue left open in *Meek*, 421 U.S. at 369, the question of excessive entanglement is pervasive and, of course, potentially dispositive.

The *Meek* Court (1) upheld a statutory provision authorizing the loan of textbooks to public and nonpublic school children; (2) invalidated the loan of instructional materials and equipment directly to the nonpublic schools; and (3) struck down the use of public school employees to provide auxiliary services to nonpublic school children on the premises of the nonpublic

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[11] In *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *summarily aff'd*, 417 U.S. 961 (1974), the district court invalidated two provisions of a state statute that: (1) authorized funds for reimbursing nonpublic school students and their parents for the cost of secular textbooks and supplies; and (2) provided funds to the nonpublic schools to acquire secular supplies, equipment, and auxiliary services. The court found that both provisions had the unconstitutional effect of advancing religion and created the potential for excessive entanglement. *Id.* at 36-42.

In *Meek*, the Court characterized its affirmance of *Marburger* as "a decision on the merits as to the constitutionality of New Jersey's auxiliary-services program [that] is entitled to precedential weight." 421 U.S. at 370 n.20. Because the Supreme Court's opinion in *Meek* is substantially similar to that of the district court in *Marburger*, this Court has focused on the *Meek* decision.

school. Some of the on-premises auxiliary services prohibited in *Meek*, such as remedial instruction and counseling, are comparable to the Title I services challenged here. The Court expressly declined to decide whether the provision of these services had the "unconstitutional primary effect of advancing religion" although it invalidated the loan of instructional material on that ground. 421 U.S. at 363, 369. Instead, the Court held that "[t]he prophylactic contacts required to ensure that teachers play a strictly nonideological role ... necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." *Id.* at 370, *citing Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619. In the Court's view, to be certain that auxiliary teachers remain religiously neutral, the state would have to restrict their activities and then "engage in some form of continuing surveillance to ensure that those restrictions were being followed." *Id.* at 372. In addition to this "administrative entanglement," the Court found "a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife.'" *Id.*, *quoting Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 792. According to the Court, the recurrent nature of the appropriation process and the repeated confrontations between proponents and opponents of the auxiliary-services program provided successive opportunities for political fragmentation along religious lines.

> This potential for political enganglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that [the statute] violates the constitutional prohibition against laws "respecting an establishment of religion."

Id.[12]

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[12] The Court s decision to rely upon a combination of the two forms of entanglement may reflect its belief that the use of publicly employed teachers mitigated the danger of administrative

To determine whether Title I creates excessive entanglement between government and religion, this Court must examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the relationship between the government and the religious authority." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 615. This inquiry reveals that Title I does not suffer from the same infirmities that doomed the auxiliary services program in *Meek*.

First, the true beneficiaries of Title I are educationally deprived children, not the parochial schools that they attend. See section 2 *supra*. The "character" of these institutions is still relevant, however, because the program provides some incidental benefits to the schools and results in some contact between school officials and Title I personnel. In ruling that the auxiliary services program created excessive entanglement, the *Meek* Court relied in part on its determination that services were provided in schools with a "dominant sectarian mission . . . in which an atmosphere dedicated to the advancement of religion is constantly maintained." *Id.* at 371. Similarly, in striking down state subsidies for parochial school teachers' salaries in *Lemon* v. *Kurtzman*, *supra*, the Court emphasized the

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entanglement. In fact, the *Meek* Court expressly recognized that the potential for "fostering of religion" is "somewhat reduced" under these circumstances. 421 U.S. at 372. In *Lemon* v. *Kurtzman*, *supra*, the first case decided on entanglement grounds, the Court invalidated statutes that authorized salary subsidies for parochial school teachers who were obviously subject to the pervasively sectarian atmosphere of the schools. Since the teachers in *Meek* were public employees, they were presumably less susceptible to such influences. Arguably, the risk of administrative entanglement alone would have been an insufficient ground to invalidate the statute.

pervasively sectarian nature of the schools involved. 410 U.S. at 615-20. According to the Court, such schools create a danger that religious doctrine will permeate secular instruction and constant surveillance would be necessary to insure that teachers do not engage in the impermissible fostering of religion. 421 U.S. at 370, 372; 403 U.S. at 619. As described above, the typical nonpublic school where Title I services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution. Nor do the Title I personnel assigned to nonpublic schools perceive a dominant sectarian mission or atmosphere in the schools in which they teach. See section 2 *supra*.

This Court recognizes that the danger of religious advancement may be present in a parochial school that is not pervasively sectarian. *See Wolman* v. *Walter*, *supra*, 433 U.S. at 235 & n.4, 249-51, and discussion in section 2 *supra*. Yet the Supreme Court's emphasis on the characteristics of pervasively sectarian institutions indicates that such school enhance the danger that religious views will be fostered. Accordingly, to the extent that this risk is minimized in New York City's nonpublic schools, which are not pervasively sectarian, the need for continuous surveillance to guard against this danger is correspondingly reduced.

Second, the nature of the aid provided by Title I and the structure of New York City's program militates against church-state entanglement. In contrast to *Lemon* and other cases, no Title I funds are disbursed to nonpublic schools or their employees. Like *Meek*, however, public school employees do provide services on the premises of the nonpublic schools. Yet in *Meek*, not only were the schools pervasively sectarian, but the record provided little or no information on how the publicly employed teachers performed their services or were supervised. *See Meek* v. *Pittenger*, 374 F. Supp. 639, 656-57 (E.D. Pa. 1974), *aff'd in part, rev'd in part,*

421 U.S. 349 (1975). The Supreme Court thus held that the district court "erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 349. This Court, however, need not rely solely on the good faith of Title I teachers and supervisors. While the district court in *Meek* stated that "[t]here is no evidence whatsoever that the presence of the therapists in the schools *will* involve them in the religious missions of the schools," 374 F. Supp. at 657 (emphasis added) the affirmative evidence before this Court establishes that Title I personnel *have not* fostered religious views or advanced relilgious activities. The record here includes a detailed description of how the City's Title I program has operated over a long period of time. Furthermore, the undisputed testimony of numerous Title I personnel demonstrates that they strictly adhere to the regulations restricting their own activities and use of materials, and that they view their role as independent of the nonpublic schools' instructional program. *See, e.g.*, Affidavit of Ilene Baron, sworn to April 5, 1979, ¶¶ 7, 8; Affidavit of Elizabeth Krywucki, sworn to April 5, 1979, ¶¶ 7, 9; Affidavit of Marilyn Lefkowitz, sworn to April 5, 1979 ¶¶ 7, 8; Affidavit of Lenore Haber, sworn to April 5, 1979, ¶¶ 7, 8. In short, because the aid provided under Title I does not result in an "impermissible fostering of religion," the "continuing surveillance" deemed necessary in *Meek* is not required to guard against the advancement of religious views or pursuits.

The relationship between the government and religious authorities is the third factor that must be examined to determine whether Title I creates excessive administrative entanglement. The different types of administrative relationships arise out of New York City's nonpublic school Title I program: (1) supervision of Title I teachers and professionals by Title I and other

public administrators; and (2) routine administrative contact between Title I personnel and nonpublic school administrators.

The first relationship—the supervision of public employees by other public officials—does not directly involve any interaction between the government and the religious institutions. Yet this case involves public supervision on the premises of the parochial schools, an arrangement that the *Meek* Court considered excessively entangled. *See* 421 U.S. at 370-72. *Meek*, however, does not govern the situation here. The Title I classrooms in which teaching and supervision generally occur are free from religious influences and are distinct from the facilities used by the nonpublic school for regular instructional activities. In the words of Lawrence Larkin, who supervises the City's Title I program for nonpublic schools:

> the operation of the Title I program in the nonpublic schools is similar in all material respects to the public school Title I program. In particular, I view the nonpublic school Title I classroom as a school within a school, unaffected by the fact that the nonpublic school in which it is situated is sponsored by or affililated with a religious denomination.

Larkin Aff. ¶ 107. To the extent that the Title I facility can be considered a public school classroom in a public school, this program is comparable to the arrangement approved in *Wolman*. As stated by the *Wolman* court, "[i]t can hardly be said that the [public] supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." 433 U.S. at 248.[13] Furthermore, Ti-

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[13] The intervenor-defendants point out that if New York City leased the Title I classrooms from the nonpublic schools, the arrangement would be comparable to that upheld in *Nebraska State Board of Education* v. *School District of Hartington*, *supra*. These defendants thus argue that

tle I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools. Larkin Aff. ¶ 78. The supervisors have only casual and periodic contact with nonpublic school administrators and little or no contact with nonpublic school teachers when they visit the schools. Affidavit of Roberta Spiegelman, sworn to April 5, 1979, ¶¶ 19, 20; Affidavit of Lucille Stovall, sworn to April 5, 1979, ¶¶ 13, 14. This Court thus disagrees with the plaintiffs' unsupported charge that such supervision constitutes "intrusionary investigatory entrances into the religious schools." Plaintiffs' Trial Memorandum of Law at 10. The supervisor reviews and evaluates only the performance of the Title I teacher in the Title I classroom; neither the parochial school nor its instructional program is subject to public examination. The occasional visits made by Title I supervisors and coordinators do not, therefore, give rise to excessive entanglement.

The routine administrative contacts that occur between Title I personnel and nonpublic school administrators fall into three basic categories: (1) disseminating information about Title I to the administrators; (2) processing requests for services; and (3) resolving

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> [i]f such lease arrangements existed, the New York City nonpublic school Title I program would presumably be constitutional under the Court's analysis in *Wolman* as well as Justice Brennan's analysis in *Nebraska State Board of Education* v. *School District of Hartington*, 195 N.W.2d 161 (Neb.), *cert. den.*, 409 U.S. 921 (1972). *See* pp. 52-53, *infra*. The constitutionality of Title I certainly should not turn on such formal distinctions of real property law. Whether the classrooms are leased by New York City—and thereby become "public property"—would in no way change the fact that those classrooms presently are free of any religious atmosphere and that the instruction that occurs in those classrooms is separate and distinct from the regular classroom instruction in the nonpublic schools.

Post-Trial Brief of Intervenor-Defendants James and Bessie Bovis at 51.

scheduling problems and other questions concerning the implementation of the program. Larkin Aff. ¶ 116. These contacts neither give the parochial school officials any control over the program nor involve Title I personnel in the affairs of the parochial schools. *See generally id.* ¶ ¶ 117-27.

Minor administrative contacts between public employees or officials and religious authorities do not violate the Establishment Clause. *See Wolman* v. *Walter*, *supra*, 433 U.S. at 246 n.13; *Walz* v. *Tax Comm'n*, *supra*, 397 U.S. at 674-76. Although the interaction here may be more extensive than in prior cases, it appears to fall within the realm of permissible government-church contacts. The *Meek* Court feared that the presence of public school teachers in parochial schools "has the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instructions." 421 U.S. at 372 n.22. This potential for controversy has not been realized in New York City's Title I program. The Title I teachers' responsibilities are clearly defined, and the nonpublic school officials understand that they have no control or authority over the program. The record demonstrates that the program's design and implementation have successfully avoided any confrontation between government officials and parochial school administrators. *See, e.g.*, Larkin Aff. ¶¶113, 127; Affidavit of Bernice Kagel, sworn to April 5, 1979,m ¶ 9; Affidavit of Faith Rubin, sworn to April 5, 1979, ¶ 18; Affidavit of Sister Miriam Blake, sworn to April 3, 1979, ¶ 15; Affidavit of Sister Mary DeSales, sworn to April 3, 1979, ¶¶ 13, 14.[14]

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[14] In an opinion recently affirmed by the Supreme Court, a three-judge court in this district stated:

> Although *Wolman* does not expressly renounce *Meek*'s theory that aid to a sectarian school's education activities is *per se* unconstitutional, it does revive the more flexible

Title I is fundamentally different than those educational aid programs that have been found to create "the potential for divisive religious fragmentation in the political arena." *Tilton* v. *Richardson*, *supra*, 403 U.S. at 688. The state statutes invalidated in *Lemon*, *Nyquist*, and *Meek* were directed to a narrow class of beneficiaries, nonpublic schools that were predominantly church-related. The Court feared that annual appropriations for such programs and recurrent legislative evaluations would produce political conflict along religious lines. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 372; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 623. In the Court's view, "the narrowness of the benefited class" is an important factor in measuring the "potential divisiveness" of any legislative enactment. *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 794.

The nationwide class benefited by Title I includes educationally deprived children in both public and nonpublic schools. Only four percent of the national Title I budget is allocated to nonpublic school students, and fewer than one-fourth of the parochial schools in New York City have Title I services on their premises. Legislative consideration of the statute, as well as annual appropriations, are thus far less likely to give rise to political debates about aid to religion. Indeed, al-

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concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.

Committee for Public Education v. *Levitt*, 461 F. Supp. 1123, 1127 (S.D.N.Y. 1978), *aff'd sub nom. Committee for Public Education* v. *Regan*, 48 U.S.L.W. 4168 (U.S., February 20, 1980 (footnotes omitted)). The court noted that "this certainty must be achieved without an excessive entanglement of the State with the sectarian institution." *Id.* n.6. Applying this "flexible concept," this Court finds that the requisite "degree of certainty" has been established here without excessive administrative entanglement.

though Congress has appropriated funds for Title I since 1965 and has occasionally amended the statute, no evidence of any "divisive religious fragmentation" has been presented. Furthermore, the proportion of the funds allocated to public and nonpublic school students is determined administratively by the New York City Board of Education pursuant to a formula mandating comparable per pupil expenditures. Larkin Aff. ¶¶ 32-35. The amount of money spent for each public and nonpublic school student is thus dictated by statutory and regulatory requirements that have not been the subject of continuous political debate. Finally, the Title I advisory councils that have been established pursuant to a statutory directive, 20 U.S.C. § 2735, have helped to defuse any potential for political tension between the public and nonpublic school sectors. Larkin Aff. ¶¶ 113, 114.

In sum, the evidence presented in this case establishes that New York City's Title I program neither creates excessive administrative entanglement nor results in divisive political fragmentation. *Meek* is therefore distinguishable from the case at bar. The Court concludes that Title I satisfies the third criterion of the Establishment Clause test.

Conclusion

The Supreme Court has observed that "[t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one ... [that] requires a careful evaluation of the facts of the particular case." *Wolman* v. *Walter*, *supra*, 417 U.S. at 426. Having considered all the evidence presented in this action, this Court concludes that New York City's Title I program does not violate the First Amendment's prohibition against the establishment of religion. The program has a secular purpose and neither advances religion nor creates exessive entanglement between the government and religious au-

thorities. While Title I could conceivably engender a program that did not satisfy Establishment Clause standards, this Court will not rule on the basis of abstract propositions. No constitutional infirmity has been revealed on the facts of this case. Accordingly, both the statute and the City's program survive judicial scrutiny.

So ordered.

/S/ ELLSWORTH A. VAN GRAAFEILAND, PER C.H.T.
ELLSWORTH A. VAN GRAAFEILAND, C.J.

/S/ CHARLES H. TENNEY
CHARLES H. TENNEY, D.J.

/S/ VINCENT L. BRODERICK
VINCENT L. BRODERICK, D.J.

Dated: New York, New York
April 18, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July, one thousand nine hundred and eighty-four.

Present: Hon. WILFRED FEINBERG, *Chief Judge;* Hon. HENRY P. FRIENDLY; Hon. JAMES L. OAKES; *Circuit Judges.*

83-6359

[Filed July 9, 1984]

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE AND ALLEN H. ZELON, PLAINTIFFS-APPELLANTS,

-against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, AND THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS-APPELLEES,

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ AND BELINDA WILLIAMS, INTERVENOR-DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

Further ordered that the issuance of the mandate shall be stayed until thirty days after the final disposition of any timely petition for rehearing or suggestions for rehearing en banc, in order to enable appellees, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. § 1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro

By EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 83-6359

BETTY-LOUISE FELTON, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, ET AL., DEFENDANTS-APPELLEES,

and

YOLANDA AGUILAR, ET AL.,
INTERVENOR-DEFENDANTS-APPELLEES.

[Filed August 2, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 1st day of August, 1984, that the defendant-appellee Secretary of Education hereby appeals to the Supreme Court of the United States from the judgment of this Court entered on the 9th day of July, 1984, in favor of the plaintiffs-appellants.

This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 2101(a).

Respectfully submitted,

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Acting Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

/s/ _____

ANTHONY J. STEINMEYER
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APPENDIX F

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * .

2. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et. seq.*, provides in pertinent part:

20 U.S.C. 2701 Declaration of policy:

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. Further, in recognition of the special educational needs of children of certain migrant parents, of Indian children and of handicapped, neglected, and delinquent children, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to help meet the special educational needs of such children.

20 U.S.C. 2736:

(c) Federal funds to supplement, not supplant regular non-Federal funds

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from regular non-

Federal sources and from non-Federal sources for State phase-in programs described in section 2751(b) of this title for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources.

20 U.S.C. 2740:

(a) General requirements:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and meeting the requirements of sections 2732 and 2733 of this title, and subsections (a), (b), (d), and (m) of section 2734 of this title, and subsection (c) of section 2736 of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) By-pass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3)(A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4)(A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his desig-

nee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

20 U.S.C. 2836(a):

Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State

approved under section 2762 or 2802 of this title, the Secretary shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall reduce or terminate further payments under this subchapter to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under this subchapter, or (2) payments by the State educational agency under this subchapter shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies or State agencies shall be reduced, as the case may be. Where partial payments to a local educational agency are continued under this subsection, the expenditure of the payments shall be subject to such conditions as the Secretary deems appropriate in light of the failure which led to the partial withholding. In the case of a substantial and continuing violation, the Secretary may suspend payments to such agency, after such agency has been given reasonable notice and opportunity to show cause why such action should not be taken.

3. Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, provides in pertinent part:

20 U.S.C. 3801:

The Congress declares it to be the policy of the United States to continue to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], but to do so in a manner which will eliminate burden-

some, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C. 3802:

During the period beginning October 1, 1982, and ending September 30, 1987, the Secretary shall, in accordance with the provisions of this chapter, make payments to State educational agencies for grants made on the basis of entitlements created under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] and calculated in accordance with provisions of that title in effect on September 30, 1982.

20 U.S.C. 3803:

(a) Program eligibility

Except as otherwise provided in this chapter, the Secretary shall make payments based upon the amount of, and eligibility for, grants as determined under the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] in effect on September 30, 1982:

(1) Part A—"Programs Operated by Local Education Agencies" [20 U.S.C. 2711 et seq.]:

(A) Subpart 1—"Basic Grants" [20 U.S.C. 2711 et seq.] and

(B) Subpart 2—"Special Grants" [20 U.S.C. 2721 et seq.].

(2) Part B—"Programs Operated by State Agencies" [20 U.S.C. 2761 et seq.]:

(A) Subpart 1—"Programs for Migratory Children" [20 U.S.C. 2761 et seq.];

(B) Subpart 2—"Programs for Handicapped Children" [20 U.S.C. 2771 et seq.];

(C) Subpart 3—"Programs for Neglected and Delinquent Children" [20 U.S.C. 2781 et seq.]; and

(D) Subpart 4—"General Provisions for State Operated Programs" [20 U.S.C. 2791 et seq.].

(b) Administrative provisions

The Secretary, in making the payments and determinations specified in subsection (a) of this section, shall continue to use the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect on September 30, 1982:

(1) Part E—"Payments" [20 U.S.C. 2841 et seq.]:

(A) Section 191—"Payment Methods" [20 U.S.C. 2841];

(B) Section 192—"Amount of Payments to Local Educational Agencies" [20 U.S.C. 2842];

(C) Section 193—"Adjustments Where Necessitated by Appropriations" [20 U.S.C. 2843]; and

(D) Section 194—"Payments for State Administration" [20 U.S.C. 2844], subject to subsection (d) of this section.

(2) Part F—"General Provisions" [20 U.S.C. 2851 et seq.]:

(A) Section 197—"Limitation on Grants to Puerto Rico" [20 U.S.C. 2853]; and

(B) Section 198—"Definitions" [20 U.S.C. 2854] and conforming amendments to other Acts, except that only those definitions applicable to this chapter shall be used.

(c) Applicability rule

The provisions of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] which are not specifically made applicable by this subchapter shall not be applicable to programs authorized under this subchapter.

20 U.S.C. 3804:

(a) General

Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children.

(b) Program design

State Agency programs shall be designed to serve those categories of children counted for eligibility for grants under section 3803(a)(2) of this title in accordance with the requirements of this subchapter.

(c) Program description

A local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b)(2) of this title, and which are included in an application for assistance approved by the State educational agency. Such programs and projects may include the acquisition of equipment and instructional materials, employment of special instructional and counseling and guidance personnel, employment and training of teacher aides, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas, the training of teachers, the construction, where

necessary, of school facilities, other expenditures authorized under title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect September 30, 1982, and planning for such programs and projects.

(d) Records and information

Each State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this subchapter).

20 U.S.C. 3805:

(a) Application by local educational agency

A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency.

(b) Application assurances

The application described in subsection (a) of this section shall be approved if it provides assurances satisfactory to the State educational agency that the local educational agency will keep such records and provide such information to the State educational agency as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the State agency under this subchapter), and that the programs and projects described—

(1)(A) are conducted in attendance areas of such agency having the highest concentrations of low-income children;

(B) are located in all attendance areas of an agency which has a uniformly high concentration of such children; or

(C) are designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency;

(2) are based upon an annual assessment of educational needs which identifies educationally deprived children in all eligible attendance areas, permits selection of those children who have the greatest need for special assistance, and determines the needs of participating children with sufficient specificity to ensure concentration on those needs;

(3) are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served and are designed and implemented in consultation with parents and teachers of such children;

(4) will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year; and

(5) make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 3806 of this title.

20 U.S.C. 3806:

(a) General requirements

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such

agency shall make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and which meet the requirements of sections 3804(c), 3805(b)(2), (3), and (4), and 3807(b) of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) Bypass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirements, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3)(A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and pri-

vate school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4)(A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Existing bypass provision

Any bypass determination by the Secretary under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] prior to August 13, 1981, shall remain in effect to the extent consistent with the purposes of this subchapter.

20 U.S.C. 3807(b):

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency

shall not be required to provide services under this subchapter outside the regular classroom or school program.

20 U.S.C. 3872:

(a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this chapter the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this chapter; or affected subchapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further payments under the chapter or affected subchapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the chapter or affected subchapter thereof, or (2) payments by the State educational agency under the chapter or affected subchapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

Upon submission to a State of a notice under subsection (1) of this section that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

4. 34 C.F.R. Part 200 (1983), provides in relevant part:

SUBPART E—PARTICIPATION IN CHAPTER 1 PROGRAMS OF EDUCATIONALLY DEPRIVED CHILDREN IN PRIVATE SCHOOLS

§ 200.70 Responsibility of LEAs.

(a)(1) In consultation with private school officials, an LEA shall provide educationally deprived children residing in a project area of the LEA who are enrolled in private elementary and secondary schools with special educational services and arrangements as will assure participation on an equitable basis of those children in accordance with the requirements in §§200.70-200.75 and Section 557(a) of Chapter 1.

(2) If the LEA decides to serve educationally deprived, low-income children under Section 556(b)(1)(C) of Chapter 1, the LEA shall also provide Chapter 1 services to educationally deprived, low-income children in private schools as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(b) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(c) The LEA shall exercise administrative direction and control over Chapter 1 funds and property that benefit educationally deprived children in private schools.

(d)(1) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association agency or corporation who or which, in the provision of those services, is independent of the private school and of any religious organizations.

(2) This employment or contract must be under the control and supervision of the public agency.

(e) In its application for Chapter 1 funds, the LEA shall make provision for services to educationally deprived children attending private elementary and secondary schools.

(Sec. 555, 20 U.S.C. 3804; Sec. 556(b)(5), 20 U.S.C. 3805(b)(5); Sec. 557(a), 20 U.S.C. 3871(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.71 Factors used in determining equitable participation.

(a) *Equal expenditures.* Expenditures for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the LEA.

(b) *Services on an equitable basis.* The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 556(b)(3), 20 U.S.C. 3805(b)(3))

§ 200.72 Funds not to benefit a private school.

(a) An LEA shall use Chapter 1 funds to provide services that supplement the level of services that would, in the absence of Chapter 1 services, be available to children in private schools.

(b) An LEA shall use Chapter 1 funds to meet the special educational needs of children in private schools, but not for—

(1) The needs of the private schools; or

(2) The general needs of the children in the private schools.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.73 Use of public school employees.

An LEA may use Chapter 1 funds to make public employees available in other than public facilities.

(a) To the extent necessary to provide equitable Chapter 1 services designed for children in a private school; and

(b) If those services are not normally provided by the private school.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.74 Equipment and supplies.

(a) To meet the requirements of Section 557(a) of Chapter 1, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with Chapter 1 funds.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.75 Construction.

No Chapter 1 funds may be used for repairs, minor remodeling, or construction of private school facilities.

(Sec. 557(a), 20 U.S.C. 3806(a))

SUBPART F—DUE PROCESS PROCEDURES
PROCEDURES FOR BYPASS

§ 200.80 Bypass—General.

(a) The Secretary implements a bypass if an LEA—

(1) Is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) Has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools.

(b) If the Secretary implements a bypass, the Secretary waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services. Normally, the Secretary hires a contractor to provide the Chapter 1 services for private school children under a bypass. The Secretary deducts the cost of these services, including any administrative costs, from the appropriate allocations of Chapter 1 funds provided to the affected LEA and SEA. In arranging for these services, the Secretary consults with appropriate public and private school officials.

(Sec. 557(b), 20 U.S.C. 3806(b))

§ 200.81 Notice by the Secretary.

(a) Before taking any final action to implement a bypass, the Secretary provides the affected LEA and SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the LEA and SEA to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the LEA and SEA that they have at least 45 days from receipt of the written notice to submit written objections to the proposed bypass and may request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the LEA and SEA by certified mail with return receipt requested.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.82 Bypass procedures.

Sections 200.83-200.85 contain the procedures that the Secretary uses in conducting a show cause hearing. These procedures may be modified by the hearing officer if all parties agree it is appropriate to modify them for a particular case.

(Sec. 557(b))4)(A), 20 U.S.C. 3806(b)(4)(A)).

§ 200.83 Appointment and functions of a hearing officer.

(a) If an LEA or SEA requests a show cause hearing, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery, or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the LEA, SEA, and representatives of the private school children of the time and place of the hearing.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.84 Hearing procedures.

(a) At the hearing, a transcript is taken. The LEA, SEA, and representatives of the private school children each may be represented by legal counsel, and each may submit oral or written evidence and arguments at the hearing.

(b) Within ten days after the hearing, the hearing officer indicates that a decision will be issued on the basis of the existing record, or requests further information from the LEA, SEA, representatives of the private school children, or Department of Education officials.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.85 Post hearing procedures.

(a) Within 120 days after the hearing record is closed, the hearing officer issues a written decision on whether the proposed bypass should be implemented. The hearing officer sends copies of the decision to the LEA, SEA, representatives of the private school children, and the Secretary.

(b) The LEA, SEA, and representatives of the private school children each may submit written comments on the decision to the Secretary within 30 days from the receipt of the hearing officer's decision.

(c) The Secretary may adopt, reverse, or modify the hearing officer's decision.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

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CLERK

No. 84-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Appellants,

– against –

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE, and ALLEN H. ZELON,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' MOTION TO AFFIRM JUDGMENT APPEALED FROM OR TO DISMISS THE APPEALS AND BRIEF IN SUPPORT OF MOTION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ, AND BELINDA WILLIAMS,

Appellants,

-against-

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE, and ALLEN H. ZELON,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

APPELLEES' MOTION TO AFFIRM JUDGMENT APPEALED FROM OR TO DISMISS THE APPEALS

Appellees move to affirm the judgment of the United States Court of Appeals for the Second Circuit entered in this action on July 9, 1984, in favor of appellees, or, in the alternative, to

dismiss the appeals of the appellants therefrom, on the ground that the judgment appealed from is so clearly in accord with the prior decisions of this Court in point that there is no substantial question for the Court to review, and the appeals may, therefore, be disposed of summarily.

If, as appellants themselves suggest, this court determines that it lacks appellate jurisdiction in this case, and treats the appellants' jurisdictional statements as petitions for writs of certiorari pursuant to 28 U.S.C. § 2103, appellees request that their memorandum be treated as one in opposition to such petitions.

In either procedural situation, appellees' position is substantially the

same: the judgment below is so clearly in accord with prior decisions of this Court that it should be affirmed (or the appeals dismissed summarily, or the applications for writs of certiorari denied).

Dated: New York, New York
September 5, 1984

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ, AND BELINDA WILLIAMS,

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BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE, and ALLEN H. ZELON,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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APPELLEES' BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT APPEALED FROM OR TO DISMISS THE APPEALS

Question Presented

Does the unanimous determination of the United States Court of Appeals for the Second Circuit declaring unconstitutional the program of the Board of Education of the City of New York, in which funds provided under Title I of the Elementary and Secondary Act of 1965 are utilized to pay public school teachers to teach remedial courses in reading, mathematics and English as a second language, and to pay other Board personnel to provide clinical and guidance services, to students of elementary and secondary church schools on the premises of those schools, raise a substantial enough question for plenary review by this Court in light of the prior decisions of the Court?

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No. 84-238

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ, AND BELINDA WILLIAMS,

Appellants,

-against-

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE, and ALLEN H. ZELON,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

APPELLEES' BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT APPEALED FROM OR TO DISMISS APPEALS

Statement of the Case

Title I of the Elementary and Secondary Education Act of 1965 ("Title

I"), 20 U.S.C. §§ 2701 et seq. (as superseded by, but effectively incorporated in, Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 et seq.) provides annual Congressional appropriations for programs proposed by local educational agencies and approved by state educational agencies for children in elementary and secondary schools who are defined educationally as below age-level performance and who reside in areas designated in accordance with regulations as having a high concentration of children from low-income families (20 U.S.C. §§ 2722, 2732-34).

The Court of Appeals for the Second Circuit has construed Title I to author-

ize the provision of funds to subsidize programs that are conducted on the premises of what are referred to in the statute as "private" schools, but will be referred to in this brief as "church-connected" or "church" schools, since that is what in the main they have proved to be, certainly in the program with which we are concerned in this case (App., 6a, n.2).[1] It is clear, moreover, that all of the appellants believe, and the Secretary of Education ("Secretary") and the Board of Education of the City of New York ("Board") have acted upon the belief, that Title I authorizes such programs.

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[1] 84% of the schools involved in this case are Roman Catholic parochial schools, and an additional 8% are Hebrew day schools (App., 7a). All references to "App." in this brief are to the Appendix to the Jurisdictional Statement submitted by the Secretary.

In any event, as the local educational agency in New York City, the Board has adopted a program, beginning in the school year 1966-67, providing for remedial courses in reading, mathematics and English as a second language and for clinical and guidance counselling to be given by public school teachers and counsellors to students of church schools on the premises of those schools as well as to students of public schools on the premises of the latter (App., 8a).[2]

The Board personnel employed in the program in church schools are chosen without reference to their religious affiliation, and the indication is that

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[2] There is no issue in this case concerning the even-handedness of the division of Title I funds between church schools and public schools.

a large majority perform their services in schools with a different affiliation from their own (App., 11a-12a). A large majority also spend less than five days a week in the same church school and work in more than one such school (App., 12a).

The personnel in the program are supervised by and accountable to the Board alone, through supervisors who are each responsible for approximately 22 teachers, and who are, in turn, supervised by program co-ordinators (App., 12a).

Each supervisor, however, apparently makes approximately one visit per month to each church school under his

supervision, and although the visit is described as "unannounced," it is obviously well known to a teacher as soon as the supervisor enters his or her classroom, in which there are approximately ten children and no other adults, and even more so to a guidance counsellor as soon as the supervisor enters a nurse's room in which the counsellor is engaged in conversation with a single student. Reliance, therefore, on the fact that the teachers and counsellors will not engage in the religious activities of the church schools or introduce "religious matter" into their work at such schools necessarily rests heavily on their willingness to follow rules prescribed by the Board, which is to say

that reliance is placed on their good faith.

Although the Board teachers and counsellors have only routine contacts with the church school authorities, they have constant, daily conferences and discussions with the "regular classroom" (i.e., church school) teachers,[3] and they also have less frequent conferences and discussions with the parents of their students (App., 12a). There is no evidence in the record of this case and no claim by the Board or by any other appellant that any of such conferences or discussions are the subject of sur-

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[3] It is acknowledged that one of the most important factors in the failure of attempts at Title I programs for students of church schools off the premises of those schools has been the lack of such communication between the public school teachers and their church school counterparts (C.A. App., A-30 to A-31).

veillance by supervisors or by any other Board personnel.

The teaching materials and equipment used in the Title I program in church schools are selected by Board personnel (App., 13a). The materials may not duplicate those used in regular classroom instruction or have any religious content (Id.). Both materials and equipment are labelled as property of the Board, and, when not in use by the public school teachers in connection with the program, are required to be kept under lock and key so that they may not be used for the religious or other purposes of the church school in which they are stored (App., 13a). To be effective, of course, this requirement

must continually be enforced by the public school teachers and, presumably, the enforcement must be spot-checked by their supervisors on some of the latter's "unannounced" visits.

The classrooms used in the Title program in church schools are located inside the church school buildings and are either rooms that were formerly used as regular classrooms of the church schools, and are presently "reserved" for use in the Title I program, or are presently used as regular classrooms when not used as Title I classrooms (App., 13a). The former is merely the "typical" situation (Id.). In either event, when used as Title I classrooms, they are required to be stripped of all

religious statues, symbols, pictures and artifacts, such as those normally present in the other classrooms of the same church school (App., 13a). This is another requirement that must continually be enforced by the public school teachers and their supervisors.

In the years that elapsed between the inception of the Board's Title I program in church schools and the closing of the hearing of this case in the District Court,[4] there have been no reports that have reached the Board of any violations of its instructions or requirements in the area of church-state relations by the public school teachers or counsellors in the program or of any

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[4] Actually 16 school years were under consideration in the District Court, although appellants refer variously to 17 and even 20 years (Board J.S., 30; Secretary's J.S., 16).

attempts on the part of church school authorities or personnel to induce the public school personnel to commit any such violations (App., 13a). On the other hand, as indicated above, there is no evidence in the record of this case of the existence at any time of any type of surveillance intensive or extensive enough to produce any such reports (see pp. 5-7, supra). On the contrary, there is ample evidence in the record that there has never been any substantial surveillance of any kind in the Board's Title I program in church schools, or, if there ever has been, it has ceased completely in recent school years.

In the annual evaluation reports on each of the five parts of the Board's

Title I program in church schools during the school year 1981-82, the last year under consideration in the District Court, there is an exhaustive analysis of the educational aspects of each part of the program, based on detailed interrogation of the Board teachers and counsellors in the program (C.A. App., A-86 to A-249). There is no evaluation, however, of any aspect of the program covered by the Board's instructions and requirements in the area of church-state relations and no indication that a single question was asked of any participant in the program (Board personnel or otherwise) concerning violations, or possible violations, of those instruc-

tions or requirements (Id.). No other reports or documents were offered in evidence in the District Court by the Board or by any other appellant containing any evaluation of that kind.

Based on the foregoing facts and the legal precedents in cases in point previously decided by this Court, the Court of Appeals unanimously reversed the judgment of the District Court in this case (and rejected the reasoning in the opinion of a three-judge court in the Southern District of New York, in a virtually identical case brought by different plaintiffs, which the District Judge in this case had adopted[5]), and held that the Board's Title I program in

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[5] National Coalition for Public Education and Religious Liberty v. Harris, 489 F.Supp. 1248 (S.D.N.Y.) appeal dismissed for untimeliness, 449 U.S. 808 (1980).

church schools violated the Establishment Clause of the First Amendment (App., 3a-53a).

Argument

THERE IS NO SUBSTANTIAL QUESTION IN THIS CASE FOR PLENARY REVIEW.

At the outset, it should be noted that all three appellants base their argument that this case involves a substantial question on the premise that, at stake, is the provision of remedial instruction in certain subjects for school children who require such instruction and who attend church schools. Appellees seriously question even that statement of the issue. The critical aspect of the matter, however, is that such a statement does not raise any question of constitutional law with which this Court is concerned. Perhaps it poses a problem within the field of

education, or at least in church school education, but such a problem is not one of constitutional proportions.

On the other hand, as the Court of Appeals noted, it appears to have been this confusion of issues that led the District Court (and the three-judge court whose reasoning the District Judge followed) to make "bad" constitutional law out of a "hard" educational case or situation (App., 52a).

Throughout this case, in order to avoid that confusion, appellees have studiously avoided dealing with the non-constitutional merits or demerits of the educational program involved in the case insofar as it has been extended

into church schools, and we will continue to do so. By our restraint, however, we do not wish this Court to be misled into the belief that we concede that any program which diverts to church schools the limited amount of public funds available to further secular education in this country is "efficient" in either the short or long term.

In this brief, appellees will also refrain from repeating any argument presented to the Court of Appeals in support of our position that the Board's Title I program in church schools has the primary effect of both impeding religion in some respects and aiding religion in others. As the Court of Appeals has indicated, in the prior

cases in point, on which appellees rely on our present motion for summary disposition of the appeals on the basis of the "entanglement" test, this Court has refrained from expressing any view of the applicability of the "primary effect" test to programs of the type under consideration, so that appellees believe that any argument based on that test would be inappropriate on a motion for summary disposition. By our silence, however, we do not wish to indicate that we have in any way abandoned our position based on the "primary effect" test, or that we will not present it to this Court if our motion for summary disposition is denied.

The Legal Precedents

As noted by the Court of Appeals, the most important of the prior decisions of this Court in point is Meek v. Pittenger, 421 U.S. 349 (1975), in which this Court declared unconstitutional a Pennsylvania statute that had provided public funds for "auxiliary services," including remedial instruction, to be given by public school personnel to students of church schools on the premises of those schools. In doing so, this Court cited Earley v. DiCenso, companion case to Lemon v. Kurtzman, 403 U.S. 602 (1971), in which it had struck down a Rhode Island statute subsidizing the teaching of secular subjects by church school teachers to church school students on the premises of their

schools. The Court explicitly refused to recognize any constitutional distinction between Meek and Earley and Lemon based on the fact that in Meek the educational services were performed by public school personnel and that in Earley and Lemon such services were performed by church school personnel (421 U.S. at 371-372).

The Court explicitly held, in Meek, that the fact that the services were performed by public school personnel on the premises of church schools gave rise to a potential of administrative entanglement between church and state in that it would, in the words of the decision in Earley, "inevitably" require "comprehensive, discriminating, and continuing

state surveillance," which in itself was sufficient to make the program in question unconstitutional, although the program also fostered political entanglement (421 U.S. at 369-370).

As the Court of Appeals in this case also noted, although Meek is the most important precedent, it is not the only one, or even the earliest. In Public Funds for Public Schools v. Marburger, 417 U.S. 961 (1974), this Court had previously affirmed a judgment of a three-judge court holding unconstitutional a New Jersey statute that had provided public funds to church schools to permit them to hire personnel of local boards of education, who, under the supervision of such boards, would

teach remedial courses and give guidance counselling to the students of the church schools on the premises of those schools. Marburger, therefore, unlike Earley and Lemon, involved educational services performed by public school personnel, as opposed to church school personnel, on church school premises. The three-judge court held nevertheless, that the continuing review of the content of instruction given by the public school teachers, which would be necessary to ensure that no religious matter would enter into such instruction, created a potential for administrative entanglement that was impermissible.

In Marburger, moreover, this Court summarily affirmed the judgment of the

three-judge court, making it a precedent for the precise procedure appellees request the Court to follow in the present case.

In Wolman v. Walter, 433 U.S. 229 (1977), this Court was given the opportunity to review and, if it were so inclined, to reject the reasoning behind its decisions in Meek and Marburger. Under consideration was an Ohio statute that provided public funds for (1) speech and hearing diagnostic services and diagnostic psychological services to be rendered by employees of the public school system to students of church schools on the premises of the latter schools (with any treatment to take place off such premises), and (2) thera-

peutic, guidance and remedial services to be rendered by similar employees to church school students entirely off the church school premises.

Although the Court upheld both parts of the Ohio statute, it took pains to distinguish and effectively to reaffirm Meek. Thus, it upheld the provision for diagnostic services on the premises of the church schools because they were essentially health, not educational, services, and it sustained the provision for the therapeutic, guidance and remedial services because they were rendered off the premises of church schools, on sites "neither physically nor educationally identified with the functions of the nonpublic school,"

which were "truly religiously neutral locations" (433 U.S. at 246-247). The Court explicitly noted that its holding in Meek was based on the potential of administrative entanglement that arose from the fact that the Pennsylvania statute in that case had provided for educational services to be performed on the premises of church schools (433 U.S. at 247).

Appellants' Attempts to Distinguish the Legal Precedents

Since the decision of the Court of Appeals directly affects the Board's program, appellees will first consider the Board's efforts to distinguish the precedents, after which it will consider the Secretary's arguments and the Intervenors' contentions.

The Board reaches Meek on page 29 of what is essentially a 33-page jurisdictional statement, of which the last three pages are devoted to other matters. When it does so, the Board offers three alleged points of distinction between the precedents and the present case.

(1) It begins by noting that "[i]n Meek, this Court placed great weight on the program's potential for political divisiveness..." (J.S., 29).[6] The basic defect in this alleged distinction, if such it can be called, is revealed in the statement of it. The characteriz-

[6] References to "J.S." in this brief are to the Jurisdictional Statement of the appellant indicated in the text.

ation of "political divisiveness" as being given "great weight"[7] confirms the Court of Appeals' analysis in its decision in the present case that in Meek the "political strife argument was simply an additional consideration to bolster a conclusion already reached on other grounds, see 421 U.S. at 372"--i.e., the potential of administrative entanglement (App., 51a. n. 24). Neither the Board nor any other appellant explicitly argues to the contrary.

(2) The Board next asserts that "[t]he nonpublic schools at which remedial services are provided... are not the pervasively sectarian institutions which concerned this Court in Meek. 421 U.S. at 356" (J.S., 29). The

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[7] In advancing the same argument, the Secretary states that the decision in Meek "rested in significant part" on the potential for "political strife" (J.S., 15)

fatal flaw in this assertion is the page citation from Meek (421 U.S. at 356). At that point in his opinion on behalf of this Court, Mr. Justice Stewart merely set forth the allegations of the complaint concerning the characteristics of the parochial schools there involved. As the Court of Appeals has pointed out in the present case, nowhere in the opinion in Meek was it suggested, no less held, that the decision of this Court rested on all of those alleged characteristics (App., 46a-47a).

In that part of the Meek opinion in which the Court struck down the statutory provision for "auxiliary services," including remedial instruction, the schools under consideration were merely

described as "schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained" (421 U.S. at 371). That the parochial schools under consideration in the present case fit such description is fully demonstrated by an extensive note in the Court of Appeals' decision, based primarily on the affidavit of the Reverend Monsignor John J. Healy, Secretary of Education of the Department of Education of the Roman Catholic Archdiocese of New York, which appellants themselves introduced in evidence in the District Court (App., 45a-46a, n. 23).

A shorter, no less cogent, response to the Board's position also appears in the Court of Appeals' decision as follows:

> "It would be simply incredible and the affidavits [submitted by appellants to the District Court] do not aver that all, or almost all, New York City's parochial schools receiving Title I aid have, in Justice Brennan's words, in Lemon, supra, abandoned 'the religious mission that is the only reason for the school's existence'" (App., 48a).

The Board's final argument is that "Meek involved a recently enacted program" whereas, allegedly, "[i]n connection with the [Board's] Title I program, there is seventeen years of experience where there has been no impermissible church-state involvement"

(J.S., 30). Since this argument is made more fully in the jurisdictional statement of the Intervenors, it will be dealt with below (see pp. 34-40, infra).

(3) The Secretary's main alleged point of distinction between the precedents and the present case (and the only such point that is not also advanced by the Board or the Intervenors) is that--

> "the only 'surveillance' involved in New York City's Title I program is the supervision of public school employees by public education authorities. The City does not conduct any 'surveillance' of persons subject to the authority of any nonpublic school (cf. Lemon, 403 U.S. at 614-621)... such supervision does not entangle Church and state; it only 'entangles' the public education authorities with their own employees" (J.S., 14-15).

The fundamental weakness in this statement is its complete reliance on Lemon (which, to be sure, involved the surveillance of church school teachers by public education authorities), and the omission of any reference to Meek, in which, as noted above, this Court expressly held that the surveillance of public school teachers by public education authorities would also lead to administrative entanglement.

The Secretary's argument that the Board Title I program involves, or need involve, only the "surveillance" of public school employees by public education authorities is also untrue and misleading. To begin with, the program

involves the "surveillance," such as it is, of not only public school personnel, but also (1) church school classrooms (to see that they are "free" of religious symbols and that the public school books and equipment in them are kept under lock and key) and (2) church school students (since it is physically impossible to conduct surveillance of public school personnel to see if they are engaging in religious discussions with their parochial school wards without at the same time conducting a surveillance of the latter).

Even more significant is the "surveillance" that the Board's Title I program has completely neglected. As noted above, a critical part of the

program is the constant daily communication between public school teachers and their church school counterparts concerning the students in the program. There has concededly been no surveillance of that communication, and, of course, there cannot feasibly be any such surveillance.

(4) As indicated above, the Intervenors' main alleged point of distinction between the precedents and the present case is the alleged record of the Board's Title I program, which the Intervenors claim covers a 20 year period, whereas only 16 years were under consideration in the District Court. Specifically, the Intervenors contend that--

> "The auxiliary services program struck down in Meek was challenged soon after its enactment, and the case reached this Court with a very meager record of how the program operated. Under these circumstances, the Court in Meek focused on the potential problems that could arise from such a program.
>
> "There is no justification for such an approach in this case" (J.S., 16).

As the Court of Appeals pointed out in the present case, this final argument of appellees is based on a complete misconception of this Court's decisions in Early, Lemon, Marburger and Wollman as well as in Meek. As the court below noted, those cases were decided on the basis of the third of the three tests described in Lemon, the "entanglement" test, and the decision below implicitly

rests on the failure of the Board's Title I program in church schools to pass that test, and not the "primary effect" test (App., 37a-38a).

Intervenors carefully avoid specifying what they mean when they say that "none of the potential problems that concerned this Court in Meek has materialized in the New York City program" (J.S., 16). They do not describe those "problems." In the District Court, they were at pains to show that public school personnel in the program did not participate in church school activities or inject "religious matter" into their instruction or counselling and that the church school authorities did not try to make them do so (App., 13a). As the

Court of Appeals noted, however, although such evidence may possibly tend to prove that the program under consideration has had the "primary effect" of fostering religion, it does not prove that it has not resulted in "entanglement" (App., 37a-38a).

It is clear from the opinions of this Court, not only in Meek, but in Earley and Lemon, that administrative "entanglement" is itself a potential, the ever-present danger of some friction arising between state and church officials as a result of a necessarily never-ending and thorough-going surveillance of all participants in a program by the state officials, for which the good faith of the participants

is not acceptable as a substitute. The precedents clearly envisage a surveillance that is all but impossible to achieve, and, if achieved, would be so irksome as to be incapable of avoiding friction.

Appellants virtually admit that they have engaged in no such surveillance. Their own view of the program under consideration is that it merely requires surveillance of public school personnel by public education authorities, and they go so far as to fashion an argument out of that self-imposed limitation to the effect that it distinguishes the program in this case from those in Earley and Lemon (but not in Meek or Marburger) (see pp. 31-34, supra).

infra). It is a startling bootstrap argument.

Appellants also have to admit, or at least the record in this case discloses, that even the alleged surveillance of public school personnel by public education authorities is virtually non-existent. The only evidence of any surveillance is one visit per month to each church school in the program by a supervisor employed by the Board. For the other 21 or 22 school days in each month, reliance must be placed upon the willingness of the public school personnel to follow instructions-- i.e., on their good faith, which this Court in all of the precedents has held to be an

unacceptable substitute for surveillance.

In addition to the foregoing, appellants' final argument assumes that this Court was not aware of what it was doing in Meek when the Court struck down the Pennsylvania program there under consideration based on its "facial" unconstitutionality, without giving its proponents a chance to develop a record on the basis of which the Court could allegedly make a more reasonable decision. Any such argument, however, overlooks Wheeler v. Barrera, 417 U.S. 402 (1974), on which appellants, and particularly Intervenors, rely so heavily to urge that such a record is necessary (J.S., 17). As the Court of Appeals has noted in the present case,

Wheeler was decided one week before this Court summarily struck down the New Jersey program in Marburger based on its "facial" unconstitutionality and one year before Meek (App., 25a-26a), and when the Court decided Meek it reversed a three-judge court that had expressly refused to hold that the Pennsylvania statute there under consideration was "facially unconstitutional" (App., 36a, n. 16).

As the Court of Appeals also noted, the limited significance of Wheeler has been egregiously distorted by appellants, since (1) the clear and only holding of this Court in that case was that the Court was expressing "no view" of Title I without a program before it,

and (2) the Court did not in any way indicate that it would not consider a program "facially" when presented.

In the last analysis, in the absence of any distinction between the precedents relied upon by the Court of Appeals, and any real precedents to the contrary, appellants are forced to characterize the decision of the court below in meaningless terms. Thus, they refer to it as applying a per se rule," which, appellees suggest, when used out of context, is simply a way of characterizing a decision that applies the legal precedents to the facts of the case at hand adversely to the party making the characterization. The phrase is plucked out of the Court's opinion in

Lynch v. Donnelly, 104 S.Ct. 1355, 1361 (1984), without any attempt at showing how the facts or holding in Lynch are applicable to those in the present case, which, of course, they are not. The full statement in the opinion in Lynch, however, is more helpful: "In each case, the inquiry calls for line drawing; no fixed per se rule can be framed" (104 S.Ct. at 1361).

Appellants submit that, based on the precedents, the Court of Appeals in the present case has drawn a line which is reasonable and clear: it is at the door of the church school, and it would prohibit from entering that door for the purpose of performing teaching and related guidance and counselling any indivi-

duals who as so engaged are employees of the state or are paid with public funds.

Conclusion

This Court should grant appellants' motion to affirm the judgments appealed from, or, in the alternative, dismiss the appeals therefrom, or, if the jurisdictional statements are treated as petitions for writs of certiorari, they should be denied.

Respectfully submitted,

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Dated: September 5, 1984

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v.

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Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR APPELLANT CHANCELLOR

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3182

Question Presented

Whether a board of education program, funded pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701 *et seq.*, providing remedial instruction and related services to educationally deprived children through public school teachers and professionals in nonpublic schools, violates the Establishment Clause of the First Amendment, where sixteen years of experience under the program has revealed no effect of advancing religion or excessive government entanglement, and prior attempts to provide such remedial services away from the nonpublic schools were unsuccessful?

Parties to the Proceeding

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the Court of Appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the District Court and were appellees in the Court of Appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the District Court and appellants in the Court of Appeals.

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BRIEF FOR APPELLANT CHANCELLOR

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which is reprinted in the Appendix to the Jurisdictional Statement submitted by the Solicitor General at page 1a, is reported *sub. nom. Felton* v. *Secretary, United States Dept. of Educ.* at 739 F.2d 48. The opinion of the United States District Court for the Eastern District of New York, which is reprinted in the Appendix to the Jurisdictional Statement at page 55a, is unreported. The opinion of the three-judge court in *National Coalition for Public Education and Religious Liberty* v. *Harris,* which is reprinted in the Appendix to the Jurisdictional Statement at page 60a, and upon which the District Court relied, is reported at 489 F. Supp. 1248.

Jurisdiction

The judgment of the United States Court of Appeals was entered on July 9, 1984. A timely notice of appeal to this Court was filed in the Court of Appeals on behalf of the Chancellor of the Board of Education of the City of New York on August 2, 1984. The Chancellor's Jurisdictional Statement was timely filed and the appeal was docketed on August 13, 1984. On October 9, 1984, this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits, and consolidated this appeal with the appeals under docket nos. 84-237 and 84-238. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1252.[1]

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[1] We will not argue the issue of juridiction in this brief, but rely on the jurisdictional arguments set out in the brief submitted by the Solicitor General and in the Chancellor's Jurisdictional Statement at pp. 3-4.

Constitutional, Statutory and Regulatory Provisions Involved

The relevant constitutional, statutory and regulatory provisions are set out at pages 108a through 127a of the Appendix to the Jurisdictional Statement.

Statement of the Case

(1)

This action was commenced by plaintiffs, six federal taxpayers residing in the State of New York, for a declaration that Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701 *et seq.* ("Title I") is violative of the Establishment Clause of the First Amendment of the Constitution to the extent it authorizes the expenditure of federal funds to finance educational services in religious schools during school hours; injunctive relief was also requested (JA:9-13).[2] Plaintiffs joined the Chancellor of the Board of Education of the City of New York as a defendant because the Board of Education administers a Title I program which provides remedial instruction and related services to educationally deprived children who are students at nonpublic schools, through public school teachers and other professionals, which services are provided during school hours on the site of the nonpublic schools (JA:11). The District Court granted the defendants' motion for summary judgment dismissing the complaint, holding that plaintiffs had failed

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[2] References within parentheses preceded by the designation "JA" are to the Joint Appendix. References preceded by the designation "App" are to the Appendix to the Jurisdictional Statement submitted by the Solicitor General.

to show that Title I, as administered in the nonpublic schools of New York City, violates the Establishment Clause of the First Amendment (App:55a-59a). The Court of Appeals reversed and granted summary judgment to plaintiffs, declaring that the provision of remedial instruction and related counseling services on the site of religious affiliated schools required such continuing state surveillance to assure religious neutrality that such surveillance itself is an unconstitutional entanglement of church and state (App:4a, 35a, 36a). The Court of Appeals has stayed the issuance of its mandate until thirty days after final disposition of any proceedings in this Court (App:54a).

(2)

In 1965, Congress enacted the Elementary and Secondary Education Act of 1965. Title I of that Act was enacted to provide federal funding for educational programs to be administered by local public educational agencies and directed to educationally deprived children in low-income areas. Congress, recognizing the significant correlation between poverty and learning deficiencies, and that full educational opportunities to all children regardless of economic background would help break the poverty cycle suffered by many in this country, "declare[d] it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. §2701; *see* S. Rep. No. 146, 89th Congress, 1st

Sess., *reprinted in* [1965] *U.S. Code Cong. & Ad. News*, pp. 1146, 1450.[3]

While Title I is administered by local public education officials, the Congressional aim was to provide needed assistance to educationally deprived children, whether those children attended public or private schools. *See, Wheeler* v. *Barrera*, 417 U.S. 402, 406-407 (1974), *mod.*, 422 U.S. 1004 (1975). Both Title I and regulations promulgated thereunder require that the services provided pursuant to Title I to students in nonpublic schools be comparable to those provided to students enrolled in public schools. *Id.*, 417 U.S. at 415; 20 U.S.C. §3806(a), setting out identical language to that contained in former section 2740(a) ("Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal . . . to expenditures for children enrolled in the public schools of the local education agency."); 34 C.F.R. §200.71 (1983) (Department of Education Regulations requiring that local educational agency make equivalent expenditures for private and public school students, and that the services provided to private school students be equitable in relation to services provided to public school students). During the 1980-81 school year, approximately 5,200,000 public school students and

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[3] Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §3801 *et seq.*, which incorporates by reference many sections of former Title I and includes virtually identical provisions governing the participation of nonpublic school students. While Congress intended, through Chapter 1, to eliminate paperwork and unnecessary federal control over Title I programs, it restated its policy of providing financial assistance to State and local educational agencies to meet the special needs of educationally deprived children. 20 U.S.C. §3801. In this brief we will continue to refer uniformly to Title I, as did the Court of Appeals (App. 3a).

approximately 190,000 nonpublic school students received educational and related services through Title I projects (JA:34).

The New York City Board of Education is the local agency responsible for administering the Title I remedial educational services program in the City of New York. When Title I funds first became available for the 1965-66 school year, the Board attempted to provide services to nonpublic school students by requiring them to travel to public schools after regular school hours to receive remedial services from public school employees (JA:63; App: 7a). Attendance was poor, and later in the 1965-66 school year the Board transferred some Title I services to nonpublic schools after school hours (JA:63-64; App:7a). However, attendance remained poor. Under both approaches, teachers were tired, students inattentive, parents expressed concern about the safety of their children, and there was little communication between Title I professionals and the classroom teachers (JA:63-64; App:7a, 71a). A proposed alternative that services be provided to nonpublic school students at public schools during regular school hours was rejected because of the doubtful constitutionality of participation of parochial school students in such a program. New York State Constitution, Art. XI, §3 (JA:64; App.8a, 71a).

Accordingly, in August 1966, the Board of Education adopted a program for providing remedial services to disadvantaged children on nonpublic school premises during the school day. The services would be provided by teachers in the public school system who would go from one school to another during the school day, and none of the work would duplicate any of the regular classroom work of the schools involved. Certain proposed programs, like speech improvement and library services, were eliminated

as being too close to regular classroom work or providing services to the nonpublic schools rather than the children (JA:64-66; App:72a).

The program adopted by the Board of Education in 1966 has continued to this day, and in 1981, it was anticipated that 21,000 nonpublic school students would receive Title I remedial services under that program (JA:38) The Board provides five types of remedial services to students at nonpublic schools: remedial reading, remedial skills centers, remedial mathematics, English as a second language, and clinical and guidance services (JA:45-46; App:10a-11a). The Board's program has been successful and participating students have shown measurable improvement in overcoming their learning disabilities (JA: 68-70). Subsequent studies have shown that its program costs considerably less than an off-site program under which transporation and other additional costs would consume 42% of the budget allocated to the nonpublic school Title I program (JA:66-68; App:8a-9a). Nonpublic schools with children receiving Title I instructional services typically set aside a classroom for exclusive use by Title I teachers. None of the nonpublic school facilities used for Title I programs contain any religious symbols or artifacts (JA:58-59; App:13a, 74a). The teachers assigned to the nonpublic school Title I program are regular salaried employees of the Board of Education (JA:46; App: 11a). Determination of which nonpublic schools a teacher or other professional will serve in is made by the Board's Bureau of Nonpublic School Reimburseable Services. Parochial school officials have no voice in the initial assignment of a Title I teacher (JA:48; App:11a, 73a-74a). Religion is not a factor in Title I assignment (JA:48; App:11a). The amount of time a Title I teacher spends at any particular nonpublic school is determined solely by the number and needs of the students eligible for Title

I assistance; in the 1981-82 school year, 78% of teachers worked in more than one nonpublic school, with children in 180 of 231 nonpublic schools receiving services from itinerant teachers (JA:49; App:11a-12a).

Prior to assignment, the Title I professionals are given guidelines which emphasize that they are accountable only to their Title I supervisors, and not to any nonpublic school official (JA:50). They are instructed not to engage in team-teaching or other cooperative instructional activities with nonpublic school teachers, although they may engage in purely professional consultations with nonpublic school teachers concerning the students' needs and progress (JA:50-51; App:12a, 74a). The teachers are directed not to introduce any religious matter into their teaching, and to refrain from any involvement in religious activities of the school (JA:51; App:12a, 74a). The Title I professionals are supervised by field supervisors employed by the New York City Board of Education who are expected to make at least one unannounced visit each month to review the performance of the Title I professional (JA:52-53; App:11a, 99a). Other supervisors provide monthly in-service training sessions, frequently on days when nonpublic schools are otherwise closed for religious holidays (JA:54; App:13a). While a large majority of the Title I teachers work in nonpublic schools which have religious affiliations different from their own, there has never been a recorded complaint by a Title I teacher of interference by nonpublic school authorities, or a report by a supervisor that teachers have engaged in religious activities (JA:49-50, 52; App.12a, 13a, 74a).

Teaching materials and equipment used in the Title I program are selected by Board employees, and may not duplicate materials used in regular classroom instruction or contain any religious content; all equipment and material is labeled as Board property, locked in storage

when not used, and is subject to annual inventory (JA: 55-57; App:13a). While there are necessarily routine administrative contacts between the Board of Education and the nonpublic school officials, they consist of three general categories of communication: 1) information about Title I; 2) processing requests for services by the schools; and 3) resolving scheduling problems and other questions concerning implementation of the Title I program (JA: 59-63; App:99a-100a).

(3)

In 1976, certain plaintiffs brought an action against the Secretary of the then Department of Health, Education and Welfare and the Chancellor of the Board of Education of the City of New York to enjoin the Board's Title I program for remedial education at parochial schools. *National Coalition for Public Ed.* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y., 1980) (hereinafter, "*Pearl*"). A three-judge court was convened. In May 1979 an evidentiary hearing was held before that Court and testimony and numerous affidavits and documentary evidence concerning the operation of the Board's Title I program in nonpublic schools were considered (App:64a).[4] The defendants presented seven witnesses who were either teachers or administrators under the Board's program (App:64a). In April 1980, the three-judge court issued its detailed opinion finding that the Board's Title I program did not violate the Establishment Clause of the First Amendment (App: 60a-103a). In applying this Court's three-pronged test,

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[4] In *Pearl*, plaintiffs seeking to proceed solely against the federal defendants and discontinue their action against the Board of Education conceded that "there is no [constitutional] violation in respect to any school within the City of New York and we ask no relief against the City of New York." (App: 65a).

the Court found first that Congress had a secular legislative purpose in passing Title I, *i.e.*, aid to needy children wherever they might attend school (App:76a-77a). The Court further found that the Title I program in New York does not have a primary effect of advancing religion, pointing out that: the federal aid went to the child rather than the school, with the child not being a mere formal recipient of the aid; the nonpublic schools are not pervasively sectarian; more than a decade's experience showed that Title I materials and equipment were not diverted from their intended use; while the classrooms used were physically unified to the nonpublic schools, all instruction remained educationally distinct, and there had been no religious enhancement through the program (App:77a-92a). Finally, the Court held that the program neither creates excessive entanglement nor results in divisive political fragmentation (App:102a). In reaching this conclusion, the Court noted, *inter alia,* that the Title I supervisors reviewed only the performance of the Title I teacher in the Title I classroom and had little contact with the nonpublic school staff, and that administrative contacts had not led to any confrontation between government officials and parochial school administrators (App:98a-100a). The Title I program has little potential for "divisive religious fragmentation in the political arena" because Title I is a nationwide program, with only about 4% of the national Title I budget allocated to nonpublic school students (App: 101a). Thus there was little chance of political debate along religious lines, and there was no evidence such debate had occurred since passage of Title I (App:101a-102a). Furthermore, the expenditure of funds for each public and nonpublic student must be comparable (App: 102a).

The appeal by plaintiffs in *Pearl* was dismissed by this Court for lack of jurisdiction. *National Coalition for Public Ed.* v. *Hufstedter,* 449 U.S. 808 (1980), *reh. den.,* 449 U.S. 1028 (1980).

(4)

This action was commenced in the United States District Court for the Eastern District of New York in 1978. As the case raised the same issues as *Pearl,* this case was stayed pending disposition of that suit (App:55a-56a). Upon final disposition in *Pearl,* motions and cross-motions for summary judgment were made, and the parties stipulated that the evidentiary record in *Pearl* be made a part of the record of this case, along with certain additional affidavits (App:10a, 56a). The District Court, in a memorandum order dated October 4, 1983, adopted the opinion of the three-judge court in *Pearl,* and granted the defendants summary judgment dismissing the complaint (App:55a-57a). The District Court also stated that the direct evidence in the record demonstrated that the Board's Title I program had resulted in no unconstitutional mixing of government and religion (App:56a-57a). A judgment dismissing the complaint was entered October 20, 1983 (App:58a-59a).

(5)

Upon plaintiffs' appeal to the Court of Appeals for the Second Circuit, that Court reversed, granted summary judgment to plaintiffs, and held that the Board's Title I plan violates the Establishment Clause. After a lengthy discussion of those decisions of this Court which it deemed pertinent, the Court of Appeals broadly held that the Establishment Clause permits public funds to be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises of the religious school (App:35a-36a). Provision of such services by public em-

ployees on the site of a religious school required such continuing state surveillance to assure religious neutrality that such surveillance itself would be an unconstitutional entanglement of church and state (App:36a). In making its finding of unconstitutionality, the Court of Appeals recognized that the Board of Education's program had "apparently . . . done so much good and little, if any, detectable harm." (App:52a). The Court also conceded that any alternative means of using Title I funds for students in religious schools would "almost certain[ly] . . . be less effective, more costly, or both." (App:52a).

The Court of Appeals did not decide whether the Board's program failed the "primary effect" test, but commented on some of the arguments presented by the defendants on that issue. The Court noted that, despite the proof submitted by defendants concerning the sixteen years of experience under the Board's Title I program for nonpublic school students, which evidence showed that there was no known instance of a Board employee becoming involved in the religious activities of an nonpublic school or injecting religious topics into his remedial instruction, the Board could not "dispel the possibility that in some significant number of instances a public school teacher has succumbed to religious influences. . . ." (JA:52; App:38a). The Court also stated that focus on the actual working of the program constituted an incorrect first amendment analysis; rather, the "potentials" for violation must be determined (App:41a). The Court also commented that approval of the Board's program could lead to political pressure to extend the use of public teachers in parochial schools to subjects like chemistry or mathematics; approval of the Board's program "would let the genie out of the bottle." (App:42a). Likewise, the regular appearance of public school teachers in parochial schools has "symbolic significance", giving the appearance of a "joint

entrprise" with some teachers paid by the public and others by a religious sponsor (App:44a). The Court also stated that the parochial schools involved in the program were sufficiently sectarian that a fair case might be made that the City's Title I program constitutes a "direct and substantial advancement of religious activity" but that in any event their nature required a degree of surveillance that would constitute unconstitutional entanglement (App: 47a-48a). Finally, the Court, in commenting on what it termed "necessary effect" arguments, stated that the circumstance that the services were provided to students in both public and nonpublic schools was of no constitutional significance and rejected the argument that the aid here was to the children rather than to the parochial schools (App:50a-51a). However, the Court restricted its holding of constitutional violation to its finding of excessive entanglement (App:51a).

Summary of Argument

The Court of Appeals has frustrated the Congressional intent and voided a successful Title I program that has assisted those educationally deprived children in the City of New York who happen to be students in parochial schools, finding only that the program's potential for entanglement is excessive (App:36a, 41a). The Court of Appeals' finding is inconsistent with the record evidence of the operation of the Board of Education's program since 1966, and fails to provide the accommodation of religion required by the First Amendment. *See, Lynch* v. *Donnelly,* —— U.S. ——, 104 S. Ct. 1355, 1359 (1984), *reh. den.,* —— U.S. ——, 104 S. Ct. 2376 (1984); *see also, Mueller* v. *Allen,* —— U.S. ——, 103 S. Ct. 3062 (1983); *Marsh* v. *Chambers,* —— U.S., ——, 103 S. Ct. 3330 (1983).

Under this Court's three pronged analysis (*see e.g., Hunt* v. *McNair,* 413 U.S. 734, 741 [1973]), it is apparent that the Board's program does not violate the Establishment Clause of the First Amendment. The Congressional purpose of assisting educationally deprived children is a proper secular purpose. The program's primary effect has not been the advancement or inhibition of religion. Title I is a national program providing benefits to millions of educationally deprived students; both across the nation, and in New York City, only a small minority of the students receiving benefits are nonpublic school students. Furthermore, consistent with Title I requirements, the Board provides Title I assistance to public and nonpublic students on a per capita basis. Such a broad provision of benefits to public and nonpublic students is an important index of secular effect. *Mueller* v. *Allen, supra,* 103 S. Ct. at 3068. The aid is provided to the student rather than the school (*Wheeler* v. *Barrera, supra,* 417 U.S. at 406), and this is another strong indication of secular rather than religious effect. *Mueller* v. *Allen, supra,* 103 S. Ct. at 3069. In light of these considerations, and as a result of safeguards adopted by the Board of Education (*e.g.,* use of religiously neutral classrooms, detailed instructions to Title I professionals, and regular supervision of Title I professionals by Board personnel), the Board's program has had, at most, a remote effect on religion. *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364.

Finally, the record shows that there has been no excessive entanglement. The Board's contacts with the administration of the nonpublic schools are minimal and would not change significantly even were the program administered off the sites of the nonpublic schools. The Board supervises only its own employees in the context of religiously neutral facilities located on the site of the nonpublic schools. As the three judge court in *Pearl*

found as fact, Title I personnel have not become involved in the affairs of parochial schools; any potential for entanglement has not been borne out by the record. (App:99a-100a). This case is distinguishable from *Meek* v. *Pittenger,* 421 U.S. 349 (1975), *reh. den.,* 422 U.S. 1049 (1975), cited by the Court of Appeals, because: a federal program is involved; there is little potential for political divisiveness along religious lines; and there can be no charge that the program is a veiled attempt to aid parochial schools. Furthermore, the nonpublic schools involved in the subject case are not the pervasive religious institutions which concerned this Court in *Meek,* and the Board's program, unlike that in *Meek,* has a long history showing that any feared potential for excessive entanglement has not been realized.

ARGUMENT

The New York City Board of Education's Title I program for the provision of remedial education services to educationally deprived children on nonpublic school premises does not violate the Establishment Clause of the First Amendment.

(1)

The Court of Appeals has found unconstitutional a substantial and successful remedial program providing services to tens of thousands of educationally deprived children who are students at parochial schools in the City of New York. The Court of Appeals, without deciding whether the program had an impermissible religious effect but rather holding that its potential for entanglement is excessive, thereby has frustrated the clear Congressional intent that these children along with all eligible children

in public schools receive needed remedial assistance, and would require that these services be provided off-site at an increased cost with a significantly greater percentage of funding being allocated to administrative costs (App: 72a-73a). It is submitted that the Board of Education's program is consistent with the requirements of the First Amendment, and that the judgment of the Court of Appeals must be reversed.

This Court has long recognized that the First Amendment does not require or even make desirable a total separation of Church and State. *Lynch* v. *Donnelly*, —— U.S. ——, 104 S. Ct. 1355, 1359 (1984), *reh. den.*, —— U.S. ——, 104 S. Ct. 2376 (1984); *Comm. for Public Education* v. *Nyquist*, 413 U.S. 756, 760 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971). Rather, "the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra*, at 614. Furthermore, as has been recently restated by this Court, the First Amendment affirmatively requires accommodation, rather than mere tolerance, of all religions. *Lynch* v. *Donnelly, supra*, 104 S. Ct. at 1359; *see also*, *Mueller* v. *Allen*, — U.S. ——, 103 S. Ct. 3062 (1983) (Minnesota statute allowing taxpayers, including parents of parochial school children, to deduct educational expenses, held not violative of First Amendment); *Marsh* v. *Chambers*, —— U.S. ——, 103 S. Ct. 3330 (1983) (Nebraska practice of opening legislative session with prayer offered by chaplain whose salary is paid from public funds is not a constitutional violation). Anything less than accommodation might well be inconsistent with the First Amendment guarantee of free exercise. *Lynch* v. *Donnelly, supra*, at 1359. This Court has been particularly sensitive to sophisticated attempts to channel aid to church-related nonpublic schools as part of a pro-

gram to aid all school children, frequently made in response to prior decisions of this Court striking down other forms of aid. *See e.g., Wolman* v. *Walter,* 433 U.S. 229, 233 (1977); *Meek* v. *Pittenger,* 374 F. Supp. 639, 664 (E.D. Pa., 1974) (dissent, Higginbotham), *revd. in part,* 421 U.S. 349 (1975.) The instant case does not involve a veiled attempt to assist parochial education. Any benefit to the student (in increased learning skills) is enjoyed not merely by the school in which he is a student, but by the nation as a whole.

This Court's three-pronged analysis provides "helpful signposts" for dealing with Establishment Clause challenges. *Hunt* v. *McNair,* 413 U.S. 734, 741 (1973). There is no question that Congress' purpose of assisting educationally deprived children is a proper secular purpose. As for the second prong of the test, on which the Court of Appeals made no finding, it is submitted that any effect on religion, rather than being a primary one, is, at most, an "'indirect', 'remote,' or 'incidental'" one. *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364. Title I aid extends to a broad class of recipients; more than 95% of the nation's students who participate in Title I programs are public school students (JA:34). Even in New York City, only about 13.2% of the students eligible for Title I assistance are nonpublic school students (JA:38). Furthermore, funds are allocated by the Board to public school and nonpublic school Title I programs on a per-capita basis (JA:43; App:7a). See, *Mueller* v. *Allen, supra,* 103 S. Ct. at 3068 (Availability of tax benefits to parents of students in both public and private schools is an important index of secular benefit). Such assistance, consistent with Congressional intent, is provided to "educationally deprived children rather than to specific schools." *Wheeler* v. *Barrera,* 417 U.S. 402, 406 (1974), *mod.,* 422 U.S. 1004 (1975). The provision of assistance directly to parents or children rather than to parochial schools is an im-

portant consideration in Establishment Clause analysis. *See, Mueller* v. *Allen, supra,* at 3069; *compare, Comm. for Public Educ.* v. *Nyquist, supra,* 413 U.S. 756 (Tax credit scheme, unrelated to amount actually expended on tuition and available only to parents of children in nonpublic schools, violates First Amendment). Finally, the record evidence shows that the provision of the remedial services on nonpublic school premises has had a secular rather than a religious effect (App:91a-92a). Among the factors which have assured that the effect was secular are the use of religiously neutral materials and classrooms, appointment of Title I teachers on a religiously neutral basis, detailed instructions to Title I teachers upon assignment delineating their duties to the secular program and their students, rather than to the nonpublic schools, and the use of Board personnel to regularly supervise their performance (JA:48-59; App:12a-13a, 73a-75a). As a result of such safeguards, there has been no recorded complaint by a Title I teacher of interference by nonpublic school authorities, or any report by a Title I supervisor that a teacher has engaged in religious activity (JA:52; App:13a).

The use of public school employees, generally working as itinerants and supervised only by other public school employees, working in religiously neutral classrooms and having only necessary professional relations with nonpublic school staff, has resulted in no religious impact. *See Wheeler* v. *Barrera, supra,* at 426 (Different First Amendment problems implicated where Title I funds are used to pay a former parochial school teacher working fulltime in a parochial school, than where "a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week."); *see also,* opinion of Justice Brennan, upon denial of certiorari in *Neb. State Board of Educa-*

tion v. *School Dist. of Hartington,* 409 U.S. 921, 924-926 (1972) (No violation of First Amendment where public school district leased religiously neutral classrooms from parochial school for provision of Title I remedial courses to public and parochial school students). As was stated in a 1971 report by the United States Office of Education, and quoted by the Court of Appeals (App:14a):

> "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." *United States Office of Education (USOE) Program Guide No. 44* (1968), *reproduced in Title I ESEA, Participation of Private School Children, A Handbook for State and Local Officials,* U.S. Department of Health, Education and Welfare, Publication No. (OE) 72-62, p. 8 (1971).

This Court has recently upheld, as not violative of the Establishment Clause, a tuition tax deduction plan providing substantial benefits to, *inter alia,* the parents of parochial school children (*Mueller* v. *Allen, supra,* 103 S.Ct. 3062), the erection of a Christmas nativity scene by a municipality as part of a Christmas display (*Lynch* v. *Donnelly, supra,* 104 S.Ct. 1355) and the payment out of state funds of a salary to a legislative chaplain (*Marsh* v. *Chambers, supra,* 103 S. Ct. 3330). In the instant case, the Board's program can have no greater impact on religion than the activity at issue in those cases. Furthermore, this Court has stated that the provision of remedial services to a segregated group of parochial students, albeit at a neutral site away from the sectarian school, is constitutional. *Wolman* v. *Walter, supra,* 433 U.S. at 244-248. It is submitted that the Board's program for providing remedial assistance to nonpublic students, provided on-

site but with a sixteen year history of having a secular impact and costing considerably less than an off-site program, is likewise consistent with the dictates of the First Amendment.

The final prong of this Court's three-part analysis, excessive entanglement, is the basis for the Court of Appeals' finding of unconstitutionality, and it is submitted that such finding is unsupported. As this Court has stated, entanglement is "a question of kind and degree." *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364. Furthermore, this Court has recognized that the State has a substantial interest in assuring that its youths receive an adequate secular education, and may take steps to ensure that its legitimate interest is being fulfilled. *Wolman* v. *Walter, supra,* 433 U.S. at 240 (Blackmun, J.). The administrative contacts involved here are minimal and do not violate the First Amendment. *Cf., Tilton* v. *Richardson,* 403 U.S. 672, 687 (1971), *reh. den.,* 404 U.S. 874 (1971) (Inspections upheld where hardly more serious than those imposed under state compulsory education laws.) The contacts with the administrators of the nonpublic schools would not be significantly lessened even were the remedial services provided off the sites of the nonpublic schools. Likewise, the Board's supervision of the Title I professionals, who are its own employees, does not involve it in the "details of administration" of the nonpublic schools. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615. The three-judge court in *Pearl,* after a consideration of the record evidence, which shows that the Board's relationship with nonpublic school authorities is essentially informational and that the Title I professionals, consistent with the Board's guidelines, have limited their teaching to their secular Title I duties, found as fact that administrative contacts between Title I personnel and nonpublic school administrators do not involve the former in the affairs of parochial schools and

fall within the realm of permissible government-church contacts; any "potential" for entanglement has not been borne out by the record of the program (JA:52, 59-61; App:99a-100a).

In finding that the Board's Title I program necessarily leads to excessive entanglement, the Court of Appeals described as "most pertinent" this Court's decision in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *reh. den.*, 422 U.S. 1049 (1975) (App:27a). That case is distinguishable from the subject litigation. *Meek* involved a Pennsylvania program furnishing, *inter alia*, remedial teachers to teach on the nonpublic school premises. In *Meek* this Court pointed to the program's potential for political divisiveness; the annual appropriations process would lead to repeated confrontations along religious lines between proponents and opponents of the auxiliary-services program. 421 U.S. at 372; *see also, Lemon* v. *Kurtzman, supra*, 403 U.S. at 622-623. The program involved here is a federal program, and only a small minority of the recipients of its aid are nonpublic school students. There is little potential for political divisiveness along religious lines, and plaintiffs have not presented any evidence of divisiveness along political lines arising in connection with Title I appropriations (App:101a-102a).[5] The nonpublic schools at which remedial services are provided by the Board are not the pervasively sectarian institutions which concerned this Court in *Meek*. 421 U.S. at 356. The schools involved are generally located in poorer areas, and serve many black children of religious persuasion other than the school at-

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[5] In *Mueller* v. *Allen, supra*, 103 S. Ct. at 3071, n. 11, this Court limited the "political diviseness" inquiry to instances where "direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Accord, Lynch* v. *Donnelly, supra*, 104 S. Ct. at 1364-65.

tended; for instance, four Catholic schools in the borough of Brooklyn have non-Catholic enrollments in excess of 40% of their student population (JA:258, 278-279). In several elementary schools in the New York Archdiocese, a majority of the students are non-Catholic (JA:258). The schools do not restrict admission by religion, or restrict hiring of staff by religion, and the three-judge court in *Pearl* found that their lesser religious character reduced the need for continuous surveillance needed in *Meek* (JA:261-264, 278; App:87a, 96a). Furthermore, *Meek* involved a recently enacted program, and this Court held that it would be improper to rely on the "good faith and professionalism of the secular teachers . . . to ensure that a strictly non-ideological posture is maintained." 421 U.S. at 369. In connection with the Board's Title I program, there is sixteen years of experience where there has been no impermissible church-state involvement (App: 92a, 100a). Finally, the state program in *Meek* (as in *Wolman* v. *Walter, supra,* 433 U.S. 229, another decision cited by the Court of Appeals), was an obvious attempt to channel aid to parochial schools, albeit in a manner fitted to prior decisions of this Court. Under such circumstances, the danger of aiding religion, and the necessary entanglement required to prevent such assistance, is far greater than in a far-reaching federal program having only an incidental effect on religion or religious schools.

In sum, the record evidence shows that the Board of Education's attempts to provide Title I remedial assistance to nonpublic school students, either off-site or after school hours, were unsuccessful in fulfilling the Congressional purpose of assisting all educationally deprived children; that off-site provision of remedial services requires a far greater allocation of Title I funds to non-instructional costs; and that the Board of Education's on-site program, over sixteen years of experience, has shown no religious

effect or excessive entanglement. Despite this record evidence, and based on a finding of *potential* excessive entanglement, the Court of Appeals has found unconstitutional a program that has been successful in achieving the goals of Congress in enacting Title I. The decision of the Court of Appeals will have a negative impact on the right of children from the lower classes to be educated at parochial rather than public schools. Should such a child remain in the parochial school, he may be denied the remedial assistance which Congress intended to give him and which might enable him to compete with students from other social strata. He might even wish to enter the public school system on the secondary level, at which point he may be unable to compete with students who have already received Title I assistance in the public school system. It is submitted that the opinion of the Court of Appeals will serve only to frustrate the statutory rights of such children, and does not supply the accommodation of religion required by the First Amendment. *See, Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1359. The judgment of the Court of Appeals should be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, with costs. The judgment of the District Court granting summary judgment to defendants upon a declaration that Title I, as administered in the nonpublic schools of New York City, does not offend the Establishment Clause of the First Amendment, should be reinstated.

October 12, 1984

Respectfully submitted,

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Nos. 84-237, 84-238 and 84-239

In the Supreme Court of the United States

OCTOBER TERM, 1984

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v.

BETTY-LOUISE FELTON, ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for educationally deprived children (in public or private schools) in low income areas, violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

PARTIES TO THE PROCEEDING

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the court of appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the district court and were appellees in the court of appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the district court and appellants in the court of appeals.

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OCTOBER TERM, 1984

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-54a) is reported at 739 F.2d 48. The opinion of the district court (J.S. App. 55a-57a) is unreported. The opinion in *National Coalition for Public Education & Religious Liberty* v. *Harris* (J.S. App. 60a-103a), on which the district court relied, is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the court of appeals (J.S. App. 104a-105a) was entered on July 9, 1984. A notice of appeal (J.S. App. 106a-107a) was filed on August 2, 1984. The appeal was docketed on August 13, 1984, and the Court, on October 9, 1984, postponed further consideration of jurisdiction to the hearing on the merits. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out at J.S. App. 108a-127a.

STATEMENT

1. a. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, is the "cornerstone" of the national effort to provide special educational assistance to needy children. H.R. Rep. 95-1137, 95th Cong., 2d Sess. 4 (1978). Over the almost 20 years of its operation, Title I has provided federal grants-in-aid "to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means * * * which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. 2701.[1]

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[1] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.* Chapter 1 continues to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I while, at the same time, eliminating burdensome and unnecessary federal supervision, direction, and control. See 20 U.S.C. 3801. Although Chapter 1 generally contains fewer and less restrictive program requirements than Title I, the provisions concerning the participation of children in private schools are virtually identical. Compare 20 U.S.C. 2740 (former Title I provision) with 20 U.S.C. 3806 (current Chapter 1 provision). See also J.S. App. 3a n.1. Moreover, Chapter 1, at 20

Title I was designed by Congress to "'bring better education to millions of disadvantaged youth who need it most.'" S. Rep. 89-146, 89th Cong., 1st Sess. 5 (1965) (citation omitted). Educational services typically made available under Title I include remedial reading, remedial mathematics, and English as a second language. See H.R. Rep. 95-1137, *supra*, at 6. By helping these children develop these basic skills, it is hoped that the cycle of poverty can be broken at its source. S. Rep. 89-146, *supra*, at 5.

Local programs must satisfy specific statutory criteria in order to qualify for Title I funds. 20 U.S.C. 3805(b). The programs must provide services to students (i) who are educationally deprived, that is, who perform at a level below normal for their age (see 34 C.F.R. 200.3(b)), and (ii) who live in an area that has a high concentration of families with incomes below the poverty level. 20 U.S.C. 3805(b). The Title I funds may be used only to provide services that otherwise would not be available to the participating students. 20 U.S.C. 3807(b).[2]

Since passage of Title I in 1965, it has been universally recognized as the largest and most successful federal educational effort. The program, which typically involves special instruction, small classes, and time with specially trained teachers (H.R. Rep. 95-1137, *supra*,

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U.S.C. 3803, expressly incorporates by reference several sections from Title I, as follows: 20 U.S.C. 2711-2713, 2721-2722, 2761-2763, 2771-2772, 2781-2783, 2791-2792, 2841-2844, 2851-2854. Because there are no material differences between the two statutes with respect to the issues in this litigation, and because the declaratory and injunctive relief ordered by the court of appeals (see J.S. App. 54a) is not affected by the changes made by Chapter 1, this case is not moot. See, *e.g.*, *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 2 n.2. Like the court of appeals, we will continue to refer to the program as "Title I."

[2] Misapplication of Title I funds by state and local educational agencies subjects those funds to recoupment by the Secretary of Education. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983). In addition, a state or local authority's failure to comply with program requirements could result in the Secretary's withholding of funds. See 20 U.S.C. 3872.

at 6), has been successful in reaching "areas that have the highest proportions of children from low-income families" (S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978); H.R. Rep. 95-1137, *supra*, at 5), and has been "extremely effective in enhancing * * * achievement." *Id.* at 6.[3] For example, participating first graders studied during the period 1975-1978 registered reading gains averaging 12 months, and mathematics gains averaging 11 months, during seven months of Title I instruction. Third graders gained an average of eight months in reading and 12 months in mathematics. These compare with ordinary gains of only seven months for each school year of instruction for disadvantaged children not served by Title I. H.R. Rep. 95-1137, *supra*, at 6. In contrast to earlier studies showing that disadvantaged students "fall more and more behind in their achievement levels," students participating in Title I tended to keep pace with "their less-needy, unassisted peers * * *, and in some instances [achieved] dramatic improvements in reading." *Id.* at 6-7.

These results confirm that Title I has been, as hoped, "a very potent instrument to be used in the eradication of poverty and its effects." S. Rep. 89-146, *supra*, at 5. See H.R. Rep. 95-1137, *supra*, at 7.

b. The equitable participation of eligible children, whether they attend public or nonpublic schools, has been a fundamental principle of Title I since its inception. Congress recognized that many families in low-income urban areas send their children to nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974). Congress therefore specifically provided that eligible schoolchildren were not to be excluded from the benefits of Title I merely because they attend private rather than

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[3] The conclusions of the House and Senate committees quoted in text were predicated largely on a comprehensive, three-year study of the effects of Title I, undertaken by the National Institute of Education pursuant to Pub. L. No. 93-380, § 821, 88 Stat. 599. The results of the study were corroborated by other sources and studies canvassed by the congressional committees.

public school. See *id.* at 406. 20 U.S.C. 2740(a), 3806 (a) provides:

> To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements * * * in which such children can participate * * *.

This provision was interpreted to mean that nonpublic school students must receive services that are "comparable in quality, scope and opportunity for participation to those provided to public school children with needs of equally high priority." *Wheeler* v. *Barrera*, 417 U.S. at 407 (citation omitted); see 45 C.F.R. 116.19(b) (1974).

The question of providing services to students in nonpublic schools has been revisited by later Congresses. Each has, without significant dissent or controversy, decided to maintain or strengthen the provisions for equitable participation of nonpublic school children in Title I.

In 1974, Congress became concerned that the then-existing mechanism for enforcement of the nonpublic school student participation requirement (disapproval of grant applications or withholding of funds under 20 U.S.C. (1976 ed.) 241f(b), 241j) was not adequate. S. Rep. 93-763, 93d Cong., 2d Sess. 29-30 (1974). Congress therefore enacted a new "by-pass" provision that would require the Secretary (then the Commissioner of Education) to supply services to eligible nonpublic school students in instances where the local educational agency was prohibited by state or local law, or otherwise substantially failed, to do so. Pub. L. No. 93-380, § 101, 88 Stat. 497-499; see 20 U.S.C. 2740(b), 3806(b).

In 1978, Congress again considered the matter, having been informed by a National Institute of Education study that many children in nonpublic schools were not being served adequately. H.R. Rep. 95-1137, *supra*, at

32-33. Congress's solution (Pub. L. No. 95-561, § 101, 92 Stat. 2171-2172) was to stiffen the requirement of comparability. Now, the statute requires (20 U.S.C. 2740(a), 3806(a) (emphasis added)) that:

> Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be *equal* (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

The requirement of participation by nonpublic school children has never encountered significant opposition or controversy, and there has never been a serious attempt in Congress to eliminate it.[4]

c. The Department of Education's regulations implementing the Title I program (now Chapter 1) are set forth in 34 C.F.R. Pt. 200. Several of these regulations specifically address participation in Title I programs by educationally deprived children enrolled in private schools. See 34 C.F.R. 200.70-200.85. The regulations require that the local public school boards that administer these programs (denominated by the regulations as "local educational agencies" or "LEAs") shall provide eligible private school children with Title I services that "assure participation on an equitable basis" (34 C.F.R. 200.70(a)(1)). The LEA must allow such children "to participate in a manner that is consistent with the[ir] number and special educational needs" (34 C.F.R. 200.70 (b)). While so doing, however, the LEA must "exercise administrative direction and control over [Title I] funds and property" used in such programs (34 C.F.R. 200.70 (c)). See S. Rep. 89-146, *supra*, at 12. The Title I serv-

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[4] In 1981, Congress substantially streamlined the program by enacting the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, §§ 552-558, 95 Stat. 464-469, 20 U.S.C. 3801-3807. Although the purpose of this Act was to eliminate needlessly prescriptive federal requirements (see 20 U.S.C. 3801), Congress carried forward the requirement of participation by nonpublic school children in full force and effect. See 20 U.S.C. 3806.

ices to private school children must be provided either by public employees or by contract with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)).

Several regulatory provisions are specifically designed to effectuate the congressional intent that no financial aid or services be provided "to a private institution," as distinguished from the educationally deprived *schoolchildren* who attend a private institution. See S. Rep. 89-146, *supra*, at 11. Thus, one provision stipulates, in accordance with express congressional intent (S. Rep. 89-146, *supra*, at 12), that Title I funds may be used only "to provide services that supplement the level of services that would, in the absence of [Title I] services, be available to children in private schools" (34 C.F.R. 200.72(a)). Another provision specifies that Title I funds may be used only "to meet the special educational needs of children in private schools" and not to meet any "needs of the private schools" themselves or any "general needs" of the private school children (34 C.F.R. 200.72(b), (1) and (2)).

Although the LEAs are permitted to make public employees available on the premises of private schools, this approach may be used only as "necessary to provide equitable [Title I] services" and only "[i]f those services are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b)). This provision accords with Congress's original statement of its intent. Congress expressly indicated that a program of assistance by public school teachers to nonpublic school children in their own schools would be proper, but "only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. 89-146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins, managers of the House bill).

The regulations also provide that "a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with [Title I] funds" (34 C.F.R. 200.74(a)). This provision, too, was anticipated by Congress in the original legislative history. S. Rep. 89-146, *supra*, at 12. Finally, the regulations expressly prohibit use of Title I funds "for repairs, minor remodeling, or construction of private school facilities" (34 C.F.R. 200.75). Cf. S. Rep. 89-146, *supra*, at 11.

d. According to the most recent data in the record, over $3 billion ($3,104,317,000) was appropriated for Title I program expenditures in Fiscal Year 1982 (J.A. 228; C.A. App. A251).[5] During the 1980-1981 school year, Title I services were provided to 5,170,935 public school children and 192,994 private school children (*ibid.*). Thus, about 3.7% of the Title I students were in private schools. And approximately $105,200,000—about 4% of the total Fiscal Year 1980 appropriation—was expended on Title I services for children attending private schools (*ibid.*).

2. a. This case concerns the largest Title I program in the nation, that operated by the Board of Education of the City of New York. This program has been in operation for 18 years, and the facts concerning it have been developed in detail in the record of this case. Those facts are essentially undisputed (J.S. App. 10a, 56a n.1).

Approximately 13% of the over 300,000 students eligible for Title I programs in New York City attend nonpublic schools, most of which are religiously oriented (J.S. App. 7a; J.A. 38, 81-82; C.A. App. A32, A80-A81). Title I students are taught remedial reading, remedial mathematics, and English as a second language and are

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[5] The Title I appropriation for Fiscal Year 1984 is $3,480,000,000. Pub. L. No. 98-139, § 209, 97 Stat. 888.

provided a clinical and guidance program designed to enhance achievement in those subjects (J.S. App. 10a-11a). In accordance with Title I and its implementing regulations (see 20 U.S.C. 3807(b); 34 C.F.R. 200.72(a), 200.73(b)), Title I funds are used to provide supplemental educational services for nonpublic school students only when these are not available in the nonpublic school.

Initially, the Board did not offer Title I instruction on the premises of nonpublic schools. Instead, it required nonpublic school students who wished to participate in Title I programs to travel to public schools after regular school hours. This approach proved, in the Board's view, to be "a total failure," largely because of the participants' fatigue and lack of attendance. J.A. 63; C.A. App. A60.[6] The Board then decided to hold some Title I classes in the nonpublic schools, but after regular school hours. *Ibid.* This approach proved unsuccessful for similar reasons: "both students and teachers were tired, * * * there was concern about the safety of children traveling home after dark or in inclement weather, and * * * communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible" (J.S. App. 8a). See J.A. 64; C.A. App. A60.

The Board then considered holding the remedial classes for nonpublic school students in the public schools during school hours. This plan was abandoned because of concerns that it would violate the New York Constitution (J.S. App. 8a; J.A. 64; C.A. App. A60-A61). In addition, a study in 1977-1978 showed that the transportation and other noninstructional costs of conducting Title I classes for nonpublic school students at sites away from

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[6] These factors are of more than usual importance because, as evidence in the record shows, educationally deprived children generally have less than average motivation to participate in school programs. The added degree of fatigue and inconvenience decreases the receptivity of these children who already have learning problems, making it very unlikely that the Title I instruction would be educationally effective. Dane Affidavit ¶ 14, DX U, Tab A-1, at 6.

their schools would have amounted to $4.2 million—an amount equivalent to 42% of the entire Title I budget for nonpublic school children.[7] In order to absorb these costs, the Board would have had to deny Title I services to over 5,000 children who had been receiving them (J.S. App. 8a-9a, 72a-73a; J.A. 66-67; C.A. App. A63-A64).[8]

New York's experience with attempts to provide Title I services off the premises of the participants' regular schools, or after regular school hours, has not been unique. Many other school districts have similarly found that on-premises programs are virtually the only effective means for providing comparable services to nonpublic school children. See *Barnes* v. *Bell*, Civ. No. C-80-0501-L(B) (W.D. Ky. filed Oct. 1, 1980); *Wamble* v. *Bell*, Civ. No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977); Dane Affidavit ¶¶ 12-17, DX U, Tab A-1, at 6-9. And some communities providing state or local funds for assistance to nonpublic school students have had the same experience. See Brief for the United States at 10-11, *School District of Grand Rapids* v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984). Indeed, it is significant that the Department of Education has, on at least one occasion, concluded after full investigation that Title I services provided at times other than during the school day "were not, and probably could not, be comparable in quality, scope and opportunity for participation, to services provided during the regular school hours". Missouri Study, J.A. 35; C.A. App. A29.[9]

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[7] A study of the St. Louis, Missouri Title I program reached similar results. J.A. 68; C.A. App. A64.

[8] Because of the requirement of "comparability" (see page 5, *supra*), the cuts in service would affect public school children as well as those attending private schools.

[9] This conclusion was based on an investigation of the Title I program in Missouri, undertaken by the Office of Education after receipt of a written complaint by parents of nonpublic school students. The Missouri nonpublic school students received remedial instruction only outside of regular school hours. The investigation concluded that services were not comparable, because the conditions

After unsuccessfully "experimenting with [these] alternative programs" (J.S. App. 71a), New York decided, in 1966, to provide Title I instruction on the premises of nonpublic schools during school hours. All the teachers and other professionals who provide Title I services, with the exception of some physicians under special contract, are regular full-time employees of the Board (J.A. 46-47; C.A. App. A41-A42). Teachers who are willing are assigned by the Board to teach nonpublic school Title I students. The Board does not inquire into teachers' religious affiliations when making assignments. J.A. 48; C.A. App. A43. The undisputed evidence is that the vast majority (73%) of the Title I teachers work in nonpublic schools with a religious affiliation different from their own. J.A. 49-50; C.A. App. A44-A45; see J.S. App. 11a-12a, 74a. In addition, 78% of the teachers, and all of the non-teacher professionals, spend fewer than five days a week in any one school and work in more than one school in the course of the week. J.A. 49, 82; CA. App. A44, A80.

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under which the services were provided led to poor attendance and poor quality services.

Attendance was poor because: students were "too fatigued" after a full day of school to attend the remedial program, the remedial classes conflicted with other activities, including after-school jobs or family chores, parents were reluctant to have their children remain at school until late in the day, the children often viewed the additional instructional time as "punishment," parents were concerned for the safety of their small children, and children were unwilling to attend on Saturdays. J.A. 35-36; C.A. App. A29-A30. Even those students who attended did not receive comparable services because of fatigue or lack of concentration and the difficulty of hiring a sufficient number of qualified specialists to provide services after the regular school day. J.A. 36; C.A. App. A30. Logistical difficulties, lack of coordination with regular teachers, and increased costs exacerbated these problems. J.A. 36-37; C.A. App. A30-A31.

As a result, the Office of Education found the Missouri program not "comparable," as the statute demands (*Wheeler* v. *Barrera*, 417 U.S. at 407-408, 415, 420-421), and the federal government undertook to provide services directly to Missouri nonpublic school students under the "by-pass" provisions of 20 U.S.C. 2740(b).

The New York on-premises program is designed to "'create[] the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school'" (J.S. App. 14a (citation omitted)). Students for the program are picked, not by the private school, but by the Board. J.A. 50-51; C.A. App. A46. The Board issues Title I teachers detailed written and oral instructions that emphasize that they are independent public school employees who are in no way responsible to the nonpublic school authorities. J.A. 50; C.A. App. A45. The private school principals are also informed of the requirement that the Title I teachers' role be kept distinct from the schools' religious aspects. J.A. 59-60; C.A. App. A55-A56. Title I teachers are instructed not to introduce any religious matters into their programs. They are also instructed not to engage in team teaching or cooperative instructional activities. They may consult with a nonpublic school teacher about a student's needs, but, if they do, they are not to engage in any religious discussion. J.A. 50-52; C.A. App. A45-A47; see J.S. App. 12a, 74a.

Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. J.A. 59; C.A. App. A55. The nonpublic schools are not reimbursed for classroom space. The materials used in the classes have no religious content. J.A. 56; C.A. App. A52. The Board retains title to the materials and equipment used in Title I classes. The teachers are instructed to keep the materials locked in storage cabinets when they are not in use; and the materials are subject to an annual inventory. J.A. 56-57; C.A. App. A52-A53; see J.S. App. 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. J.A. 53; C.A. App. A48. The field supervisors answer to the Board's program coordinators, who also make occa-

sional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matters into a class. J.A. 52, 55, 80-81; C.A. App. A47, A50, A79; see J.S. App. 13a-14a, 87a.

b. The record shows that the disadvantaged children who have participated in New York's on-premises Title I program have made significant educational progress.

New York City's Title I Corrective Reading Program served 11,789 disadvantaged students in the nonpublic schools in the 1979-1980 school year. The program consisted of small group instruction by full-time public school reading specialists (in groups of 10 or fewer children), using multi-media as well as conventional reading materials. Participating students at all grade levels achieved gains in performance well above those of a nationally representative group. While the Title I nonpublic school students tested at the 14th to 18th percentile in reading comprehension prior to participation, at the end of the school year they had advanced to between the 27th and the 30th percentile. See Final Evaluation Report, J.A. 120-124; C.A. App. A127-A131.

New York City's Reading Skills Program, a one-on-one program for children with severe reading problems, served some 431 nonpublic school students during 1979-1980. The results here, too, were highly positive. The students advanced from between the 10th and 16th percentiles, to between the 22d and 32d percentiles. See Final Evaluation Report, J.A. 159-161; C.A. App. A171-A174. Similarly, the Corrective Mathematics Program, which served 8,547 nonpublic school students, and the English as a Second Language Program, which served 3,360 nonpublic school students, saw participants improve

their skills dramatically. See Final Evaluation Report, J.A. 89-91, 187-189; C.A. App. A90-A94, A205-A207.[10]

3. Appellees, six federal taxpayers, brought this suit in 1978 in the United States District Court for the Eastern District of New York. They contended that the Constitution prohibits public employees from providing remedial education on the premises of religious schools during regular school hours. They sought declaratory and injunctive relief against the operation of New York City's Title I program. Four individuals whose children attend private elementary schools in New York City and receive Title I educational assistance subsequently intervened as defendants (J.S. App. 9a-10a; see J.A. 2, 9-13; C.A. App. A2, A3-A7).

The district court stayed proceedings in this case pending the outcome of another suit, also challenging New York City's program of on-premises Title I instruction, which was pending before a three-judge court in the United States District Court for the Southern District of New York. *National Coalition for Public Education & Religious Liberty (PEARL)* v. *Harris*, 489 F. Supp. 1248, appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (J.S. App. 60a-103a).[11] The three-judge court in *PEARL* unanimously upheld the constitutionality of the program. The parties to this case then stipulated that this case would be heard on the record developed in *PEARL*, as supplemented by various affidavits and documents (J.S. App. 10a, 56a).

The district court granted summary judgment for the defendants (J.S. App. 55a-59a). The court agreed with the reasoning of the three-judge court in *PEARL* and rejected the plaintiffs' argument that *Meek* v. *Pittenger*, 421 U.S. 349, 367-373 (1975), compelled the conclusion

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[10] The final evaluation reports of these programs did not translate pupil improvements into percentile figures, but test scores indicated significant improvements relative to the nationally representative group.

[11] The appeal in *PEARL* was not timely filed. See C.A. Br. for Plaintiffs-Appellants at 3 n.*.

that the Title I program was unconstitutional (J.S. App. 56a-57a).

The court of appeals, relying principally on *Meek* v. *Pittenger*, *supra*, reversed (J.S. App. 1a-54a). The court did not question any of the factual conclusions reached by the district courts that had considered New York's Title I program (see *id.* at 10a). The court explicitly acknowledged the considerable good the program had accomplished (*id.* at 4a, 52a). The court nevertheless held that "the Establishment Clause, as it has been interpreted by the Supreme Court, constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise" (J.S. App. 4a (citations omitted); see *id.* at 36a-39a, 50a-53a).

The court of appeals interpreted *Meek* as creating a per se rule that the supervision needed to ensure that public employees not further a religious school's religious purposes necessarily creates "a constitutionally excessive entanglement of church and state" (J.S. App. 36a (footnote omitted)). The court specifically stated that it was not ruling on "the merits of the argument" that the supervision of public school teachers in a nonpublic school did not, on this record, create an unconstitutional degree of entanglement (*id.* at 53a); it made clear that it simply felt itself to be bound by the dictates of *Meek*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case touches on the national commitment to equal educational opportunity. It raises the question whether that commitment is hobbled by a constitutional rule that precludes Congress and the states from continuing a highly successful program to provide remedial education to disadvantaged children on an even-handed basis—including those whose beliefs lead them to exercise their constitutional right to attend private religious schools.

In a day when skepticism and controversy surround virtually every governmental undertaking, a remarkable consensus supports both the ends of this program and the

means adopted to achieve them. The purpose of Title I is to enhance equal opportunity—to give more Americans a chance to achieve the material and intellectual fulfillment that only education can provide. The method adopted is to enlarge access to specialized instruction in educational fundamentals. There is nothing fancy or trendy in these programs; they bring the basics (remedial English, reading, mathematics) to youngsters who are educationally handicapped by poverty and who otherwise would be deprived of this expert help because they attend schools that do not provide it.

The key to the program is that the aid is for *children*. It is not schools that are eligible, but children. And, from the beginning, Congress has been insistent that *all* children who need the program must have equal access to it, no matter what school they go to. A program that seeks to enlarge equal opportunity is not to be distributed in a way that discriminates.

It is in pursuit of these aims that the widely admired program at issue here has developed. For almost 20 years New York City, funded by the federal government, has been providing basic remedial education to educationally handicapped poor children—children who would otherwise go without it. More than 20,000 of these children attend private (including private religious) schools—as of course they have a right to do. New York has worked conscientiously to satisfy the statute's central command of equitable participation for all eligible children. And by a process of trial and error New York has discovered what common sense would in any event teach—that the program can be truly successful and cost-effective only if the remedial instruction takes place during school hours in the school that the child actually attends. In this setting of poverty and cultural deprivation, the chance that help will actually reach the student who needs it is dramatically impaired if the remedial instruction is available only at a distance or outside of normal hours. So New York has adopted the *educationally* correct and sensible solution: it has brought the remedial program to the schools that the eligible students actually attend.

And on this basis the program has flourished, an unquestionable success.

But the court of appeals tells us that all this must cease. That court concedes that this program "has done * * * much good and little, if any, detectable harm" (J.S. App. 52a), and that "other ways of using Title I funds for the benefit of students in religious schools * * * are almost certain to be less effective, more costly, or both" (*ibid.*). But we cannot have this admirable and desirable program because, we are told, the Constitution contains a rigid per se rule that the use of public funds for secular instruction by secular teachers under secular control on the premises of religiously oriented schools constitutes an "establishment" of religion.

The question we raise is: Why? Is this per se rule compelled by the language or history of the Establishment Clause? Nobody so asserts. Rather, the rule rests on a theory about facts. The theory is that publicly funded remedial instruction, provided to educationally disadvantaged children by public school teachers under public school control on premises borrowed from religious schools, will inevitably be subverted and turned to religious ends—unless there exists a level and intensity of surveillance over the enterprise that itself constitutes an impermissible "entanglement" between Church and State.

So we turn, then, to the facts. Is there a body of actual experience that has been put forward to support these empirical assertions? The record is clear: elaborate and conscientious inquiry has been made by two district courts into the actual New York experience. And that experience shows that the program has in fact done only what it is supposed to do—benefit the secular education of deprived youngsters—and has not been subverted or turned to religious or sectarian ends. Further, the record shows that this has been accomplished without any extraordinary or impermissible surveillance—that no detectable "entanglement" has *in fact* occurred. But, we are told by the court of appeals, the actual record of experience of the New York schools is irrelevant and may not be examined. Rather, the proposition that—

absent extraordinary and constitutionally impermissible precautions—the program will be turned to impermissible ends is simply to be assumed, a priori. And this, we are told, is required by this Court's cases.

In the face of this holding, our submission is straightforward. Nothing in the Constitution requires us to adopt the unwelcome rule that Congress and the states are rigidly disabled from rendering secular remedial assistance to educationally deprived children in their own schools. Nothing in this Court's cases should be read to impose on us the self-defeating ordinance that remedial English and mathematics can be brought to needy private school children only under conditions which guarantee that the effort is likely to be a costly failure. Nothing forces us to the perverse principle that actual facts and actual experience must be deemed irrelevant in determining whether a given program actually constitutes a threat to the values of the Establishment Clause.

1. We submit that an analysis of this record in light of this Court's decisions will reveal, as the district courts concluded, that New York's on-premises Title I program for nonpublic school students has a secular purpose, has a primary effect that neither advances nor inhibits religion, and occasions no excessive entanglement between governmental and religious authorities.[12] The question of purpose is, indeed, conceded: no one doubts that improving the education of needy youngsters is a worthy and legitimate governmental function. The question of effect, though not addressed by the court of appeals, was resolved in favor of the program by the district courts. The program maintains a thorough neutrality, providing educational assistance on an equal basis to all eligible children whether they attend public or private schools. It provides no direct or indirect assistance to the nonpublic schools themselves. Because the remedial instruction is provided directly to the participating students, and be-

[12] In Part A, *infra*, we set forward the reasons why this Court has appellate jurisdiction under 28 U.S.C. 1252. Appellees have not challenged the jurisdictional basis for this appeal.

cause only such instructional services as would not otherwise be available are federally funded, the schools reap no benefit. The Title I courses themselves are entirely secular, and the record shows that the Title I teachers have not allowed religious influences to affect their teaching.

2. The court of appeals held the program unconstitutional because of its potential for excessive entanglement. In particular, the court concluded that, under *Meek* v. *Pittenger*, 421 U.S. 349 (1975), the degree of surveillance of Title I teachers that would be needed to guarantee that religious influences did not insinuate themselves into the teaching would itself constitute excessive entanglement. However, the court did not find, and the record would not permit a finding, that the present level of surveillance *in fact* is extensive, let alone impermissibly "entangling." In the absence of a factual finding that more extensive surveillance would be needed in order to obviate impermissible effects, the court should have upheld the program.

Meek does not compel a contrary conclusion. *Meek* should not be read as committing this Court to a rigid per se rule against on-premises instruction. Indeed, decisions before and after *Meek* belie any such interpretation. And *Meek* itself involved a different program—one that lacked adequate guidance and safeguards to prevent controversies over the respective authority of Title I and private school personnel, that *required* the instruction of nonpublic school students to be conducted on the premises of private schools whether or not it would be educationally necessary, and that involved annual appropriations battles with attendant political divisiveness. Most importantly, the decision in *Meek* was made on the basis of an abstract claim of reliance on the good faith and professionalism of the teachers rather than, as here, on a 16-year documented history of successful avoidance of religious influences or entanglements.

3. The reasons given by the court of appeals for declining to assess its holding in light of the factual record are not persuasive. Indeed, they suggest that the court

of appeals has improperly reversed the burden of proof, in effect applying a presumption of unconstitutionality to this statutory program. Further, the court's approach seems quite contrary to the values of evenhandedness and accommodation that infuse the Religion Clauses. The effect of the decision below is to penalize and discourage the exercise of constitutional rights—certainly an ironic reading of the First Amendment.

ARGUMENT

NEW YORK'S TITLE I PROGRAM OF REMEDIAL EDUCATIONAL SERVICES FOR EDUCATIONALLY DEPRIVED CHILDREN, PROVIDED BY PUBLIC SCHOOL PROFESSIONALS ON PRIVATE SCHOOL PREMISES, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. This Court Has Appellate Jurisdiction Under 28 U.S.C. 1252

The court of appeals held that the Establishment Clause of the First Amendment forbids the expenditure of funds appropriated under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, on remedial instruction for students of nonpublic religiously oriented schools, if that instruction occurs on the premises of those schools. As this Court has held (*Wheeler* v. *Barrera*, 417 U.S. 402, 422-423 (1974)) and as the court of appeals explicitly recognized (J.S. App. 6a n.2, 24a), Title I authorizes such expenditures. Indeed, the legislative history of Title I shows that Congress specifically contemplated on-premises instruction (S. Rep. 89-146, 89th Cong., 1st Sess. 12 (1965)), and a regulation specifies that such instruction is to be provided only "[t]o the extent necessary to" satisfy the statutory mandate that comparable services be supplied to public and nonpublic school students (34 C.F.R. 200.73(a)). The record in this case amply demonstrates that on-premises instruction was in fact required in order to satisfy this mandate.

Since the holding of the court of appeals is that the Constitution prevents Congress from achieving a central purpose of the statute—that private and public school students have equal access to remedial instruction—our submission is that the court of appeals has "held [Title I] unconstitutional as applied to a particular circumstance" (*United States* v. *Darusmont*, 449 U.S. 292, 293 (1981)) and an appeal lies to this Court under 28 U.S.C. 1252. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982). Cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939). Since the Secretary is a party to this litigation, he would be bound by a holding that an on-premises Title I program is unconstitutional. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). While the court of appeals did not explicitly state that Title I was unconstitutional as applied (as is normally required to found an appeal under Section 1252), this case is one of those unusual instances in which such a determination "was a necessary predicate to the relief" that is granted (*United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).[13]

We note that in *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968), this Court held that a claim that New York City's Title I program violated the Establishment Clause —the same claim that is made by plaintiffs here—was properly brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282. The interpretation of Section 2282 sheds light on the meaning of Section 1252 because Section 2282 provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress "on ground of unconstitutionality," and both Section 1252 and Section 2282 were enacted as part of the same statute (Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752).

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[13] In their complaint (J.A. 12; C.A. App. A7), appellees sought a declaration that "insofar as Title I of the Act authorizes the expenditure of federal funds to finance educational services in religious schools during school hours it is unconstitutional as violative of the Establishment Clause of the First Amendment."

If the Court determines that it lacks appellate jurisdiction in this case, we request that it decide this case on writ of certiorari (see 28 U.S.C. 2103). The importance and national impact of the question of constitutional law decided by the court of appeals warrants such review.

B. The Title I Program Of On-Premises Instruction For Disadvantaged Nonpublic School Students Has, As The Court Of Appeals Recognized, "Done Much Good, And Little, If Any, Detectable Harm"

This case raises important questions about our national commitment to equal educational opportunities for all of our country's children—whether rich or poor, gifted or slow, devout or indifferent—all alike. That commitment rests on insights that today command virtually unanimous assent: education, in our modern society, is indispensable to a successful and fulfilled life; it is a fundamental obligation of government to assure every child an equal opportunity to receive an adequate education; breaking the poverty-related barriers to education is central to breaking other aspects of the poverty cycle itself; this entails the creation of special educational programs for those children who start the course hobbled by the fetters of poverty and educational deprivation. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

Accordingly, Congress has established as a high national priority the provision of special educational assistance—especially in the basic skills of reading, language, and mathematics—to disadvantaged youngsters whose schools would not otherwise provide it. The "cornerstone" of this effort is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.* (see H.R. Rep. 95-1137, *supra*, at 4), which is based on the recognition that there is "a close relationship between conditions of poverty and lack of educational development and poor academic performance." S. Rep. 89-146, 89th Cong., 1st Sess. 5 (1965)).

From the beginning, Congress has determined that otherwise qualified disadvantaged youngsters attending

nonpublic schools should be able to participate in Title I programs on an equitable basis; and successive Congresses have affirmed and strengthened this determination. See pages 5-6, *supra*. The concept of parity between public and private school students reflects two fundamental concerns.

First, Congress intended Title I to provide aid to *children*—not institutions—and recognized that many educationally disadvantaged students in low income areas attend nonpublic schools, often at great financial sacrifice to their families. To deny services to classes and categories of needy students would undermine the objectives of Title I. As this Court observed in *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974) (emphasis in original; footnotes omitted):

> The Congress, by its statutory declaration of policy, and otherwise, recognized that all children from educationally deprived areas do not necessarily attend the public schools, and that, since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act.

Second, Congress intended to treat all eligible children equally, thereby remaining neutral as between public and nonpublic schools. To deny Title I services to students who attend nonpublic schools would discriminate against some children—those exercising a constitutional right.

Indeed, Congress has placed an ever greater emphasis on equality as experience has shown that, in many instances, disadvantaged students in nonpublic schools were not receiving their fair share of Title I assistance. Thus, in 1978, Congress required for the first time that expenditures for eligible students in nonpublic schools shall be "equal" to expenditures for public school children. See pages 5-6, *supra*. The purpose of this was not to benefit religion or religious schools, but simply to ensure the "equitable participation of children enrolled in

nonpublic schools." S. Rep. 93-763, 93d Cong., 2d Sess. 30 (1974).

In guaranteeing equitable participation to all, Congress has followed the path set by *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), in which this Court held that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (*id.* at 242). Cf. *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952).

While insisting that disadvantaged nonpublic school students be permitted to participate equitably in the program, Congress has also been aware that programs of educational assistance to religiously oriented private school students must be carefully structured to avoid impermissible advancement of religion or excessive entanglement between Church and State. See S. Rep. 89-146, *supra*, at 11-12. Congress left decisions on the details of the Title I program to the discretion of local authorities (within statutory and regulatory limits). However, it anticipated that public school teachers would be made available to disadvantaged students on the premises of nonpublic schools, and specified that this may be done "only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school." *Ibid.* Congress expected that the program could thus be "interpreted and administered in a manner consistent with the establishment of religious provision of the first amendment of the Constitution." *Id.* at 37 (quoting memorandum from Department of Health, Education, and Welfare).

It is in pursuit of these aims, and with these safeguards, that the program at issue here developed. For almost 20 years New York City, funded by the federal government, has been providing basic remedial education

to hundreds of thousands of educationally deprived poor children—children who would otherwise go without it. Some 20,000 of these children (in the 1981-1982 school year) attended private school. New York has been conscientious in satisfying the statute's central command of equitable treatment for all eligible children.

The record in this case demonstrates that the Title I program in New York City, like that nationwide, has been highly successful. The improved performances of participants in the on-premises program bear eloquent testimony to the impact this program is having on disadvantaged children in New York's nonpublic schools. See pages 13-14, *supra*.

In its opinion, the court of appeals recognized the success of the program, observing that "[w]e have no doubt that the program here under scrutiny has done much good." J.S. App. 4a. It also recognized the practical consequences of its ruling that disadvantaged schoolchildren attending religiously oriented schools are foreclosed from receiving remedial assistance from Title I teachers at their school. The court "ha[d] no doubt" that the local school authorities "could reasonably have regarded" the on-premises program "as the most effective way to carry out the purposes of the Act." J.S. App. 4a. Indeed, the court concluded that "[w]hile other ways of using Title I funds for the benefit of students in religious schools can be found, these * * * are *almost certain to be less effective, more costly, or both.*" J.S. App. 52a (emphasis added).

The record graphically substantiates and quantifies the court of appeals' conclusion. See pages 9-11, *supra*. Additional transportation and other noninstructional costs alone would consume some $4.2 million (in 1977-1978 figures)—more than 42% of the budget for the nonpublic school Title I program. In human terms, this would mean that more than 5,000 children—a number equivalent to 36 out of every hundred nonpublic school students now being served—would be forced out of the

program.[14] And for those children who continued to be served, as the court of appeals recognized (J.S. App. 7a-8a, 52a), the Title I services would almost certainly be less effective. See J.A. 34-37, 63-64, 66-68; C.A. App. A28-A31, A60, A62-A64; Dane Affidavit ¶¶ 12-17, DX U, Tab A-1, at 6-9. Moreover, if—as seems likely [15]—remedial instruction under a revised program would have to take place after regular school hours, experience documented in the record shows that attendance may be expected to be poor, and that both teachers and students may be expected to be too tired for the program to be effective. See pages 9-11, *supra*. The judgment below would thus result in clear and well-documented injury to thousands of disadvantaged youngsters.

On the other hand, the court of appeals recognized that, under the detailed, 16-year record compiled and examined by two district courts, the efforts of the program "to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion" have been "largely successful." J.S. App. 4a. In particular, the court did not overturn the factual finding of the district court in *PEARL* (J.S. App. 97a), adopted by the district court below (J.S. App. 56a), that the Title I program in New York City had successfully

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[14] Even under the existing program, resources are too scarce to serve all eligible children. In the 1981-1982 school year, only 21,000 out of 40,120 eligible nonpublic school students received Title I remedial services. J.A. 38, 81; C.A. App. A32, A80.

[15] Title I "evinces a clear intention that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds." *Wheeler* v. *Barrera*, 417 U.S. at 417 (footnote omitted). New York authorities concluded that to permit nonpublic school students to participate with public school students at the public schools during the school day might violate Article XI, Section 3 of the New York Constitution. J.S. App. 8a. Accordingly, if the judgment below is sustained, the most likely result would be to return to a system of transporting nonpublic schoolchildren to public schools for remdial instruction after school hours—a system New York and other school districts have concluded is a "total failure" (J.A. 63; C.A. App. A60).

avoided "an 'impermissible fostering of religion'" without "the 'continuing surveillance' deemed necessary in *Meek*." The court of appeals accurately summarized the evidence in the case when it commented that the program "apparently has done * * * much good and little, if any, detectable harm." J.S. App. 52a.

This case does not involve a casual program, lightly entered into or easily abandoned. The program invalidated by the court below represents a central feature of federal educational policy, now almost 20 years old, established and refined with rare unanimity by successive Congresses whose deliberations demonstrated full understanding and sensitivity to the church-state problems involved. It is a program of major significance to New York and like communities across the nation, which have, after extended experience and experimentation, determined that an on-premises program is virtually the only effective means for providing comparable services to disadvantaged nonpublic school students. And thousands of disadvantaged children have gained precious opportunity from this program; they stand to lose grievously if the decision below is affirmed.

Under these circumstances, appellees bear a heavy burden of persuasion that this major program, which has been shown on the record to have been so needed and successful and at the same time to have occasioned no "detectable harm" to First Amendment values, should be held unconstitutional. If "'the measure of constitutional adjudication'" in the Establishment Clause area "'is the ability and willingness to distinguish between real threat and mere shadow'" (*Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 11, quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)), appellants here are entitled to wonder where the "real threat" from this program lies.

C. An Analysis Of The Record Demonstrates That New York's Title I Program Has A Legitimate Secular Purpose, Does Not Impermissibly Advance Religion, And Has Not Occasioned An Excessive Entanglement Between Church And State

1. *Purpose.* It is neither disputed nor disputable that Title I is animated by a legitimate and admirable secular purpose: providing enhanced educational opportunites for disadvantaged children. See *PEARL*, J.S. App. 76a-77a. Appellees have so conceded (C.A. Br. 20).[16]

The specific decision to provide Title I services to nonpublic school students on the premises of the nonpublic schools is also the product of solely secular considerations. As detailed above (see pages 9-11, *supra*), the New York City Board of Education decided to provide Title I services on the premises of private schools only after other alternatives were considered and unsuccessfully attempted. These alternatives—providing services off the premises or after school hours—would serve fewer students and serve them less effectively. Dane Affidavit ¶¶ 12-17, DX U, Tab A-1, at 6-9. In some circumstances, the alternatives have been found to fall short of the statutory requirements of comparable services. See page 10 & n.9, *supra*. Consequently, the Board turned to the present method as the only feasible means to provide children in nonpublic schools with Title I educational services comparable to those in public schools. See J.A. 63-68; C.A. A59-A64; J.S. App. 7a-9a, 71a-73a.

2. *Effect.* The Title I program "is working as Congress intended it should" (H.R. Rep. 95-1137, *supra*, at 5 (quoting testimony before the committee)). The primary effect of the program has been exactly that envisioned by

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[16] This Court has recognized that the welfare of all residents is enhanced by government programs that endeavor to provide for all schoolchildren, including those attending nonpublic schools, "a fertile educational environment" (*Wolman* v. *Walter*, 433 U.S. 229, 236 (1977)), and an "ample opportunity to develop to the fullest their intellectual capacities" (*Meek* v. *Pittenger*, 421 U.S. at 352 n.2). See also *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 5-6; *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 654 (1980).

Congress: to improve the educational opportunities of educationally disadvantaged youngsters in low-income areas. The results of the New York on-premises program, discussed at pages 13-14, *supra*, fully substantiate the beneficial secular effects of the program.[17]

It is also undeniable that the primary effect of the program has been neither to advance nor to inhibit religion. This is because, as is required by the governing statute, comparable services are provided to eligible schoolchildren whether they attend public or nonpublic schools. If Title I services were provided solely to nonpublic school students, it might be said that the program had the effect of promoting religious education. Conversely, if Title I services were withheld from students attending religiously oriented schools, it might be said that the program had the effect of discriminating against religion. As it is, the effect of the program is absolutely neutral. See *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 8-10, distinguishing *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).[18]

Before this Court is a record documenting the actual operation of the New York Title I program since its

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[17] Thus, even if there are benefits to religion stemming from the Title I program (and none can be found from the record), such effects are surely " 'indirect,' 'remote,' or 'incidental' " in comparison with the successful and well-documented record of secular achievement under this program for disadvantaged students. See *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 13, quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771 (1973).

[18] See also, *e.g.*, *Widmar* v. *Vincent*, *supra*; *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Board of Education* v. *Allen*, *supra*; *Americans United for the Separation of Church & State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977) (statute providing aid to all needy college students, including those in religious colleges, does not have prohibited effect on religion). Cf. *Sloan* v. *Lemon*, 413 U.S. 825, 832 (1973) (state tuition grant scheme only for benefit of parents with children in private schools found unconstitutional for "singl[ing] out a class of its citizens for a special economic benefit").

inception. That record reveals that, during the program's 16-year documented history, there has been no known instance of any Title I teacher or professional succumbing to religious influences by introducing religious materials into the Title I classroom, becoming involved in the nonpublic schools' religious activities, or being pressured by nonpublic school personnel to compromise the secular character of the Title I program. J.A. 52, 80-81; C.A. App. A47, 479. Indeed, the danger of Title I employees inculcating religion is remote because most teachers do not share the religion of the schools to which they are assigned and are itinerant—teaching in several schools, often of differing religious sponsorship. See page 11, *supra*.[19]

It must be stressed, in connection with the "effects" inquiry, that Title I services are provided directly "to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera*, 417 U.S. at 406 (emphasis in original). No tax-funded resources are placed at the disposal of religious school authorities.[20] This distin-

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[19] Appellees contend (C.A. Br. 40-43; Geller Affidavit, J.A. 232-233; C.A. App. A256-A257; see Motion to Affirm or Dismiss 17-18) that the on-premises program has benefitted religion because the public school professionals working in the program have been induced by the religious atmosphere of the nonpublic schools, or by their contacts with nonpublic school faculty, to introduce religion into their teaching. The simple answer to this is that there is not a shred of evidence in the record to support this supposition, and the district courts to consider the argument flatly rejected it on the record. As the *PEARL* court found (J.S. App. 97a (emphasis in original)), the Title I instructors here "*have not* fostered religious views or advanced religious activities." See also J.S. App. 56a-57a, 91a-92a.

[20] In this respect, the program at issue here is less problematic than the payments for administration of state-controlled tests upheld in *Committee for Public Education & Religious Liberty* v. *Regan*, *supra*, or the textbooks upheld in *Mueller* v. *Allen*, *supra*, and *Meek* v. *Pittenger*, 421 U.S. at 359-362. The governing principle is that resources that are inherently capable of diversion to use for religious instruction must not be placed under the control of religious school authorities. *Wolman* v. *Walter*, 433 U.S. at 250-251.

guishes the Title I program from many others invalidated by this Court. As the Court pointed out in *Mueller* v. *Allen*, slip op. 10, it is "noteworthy that all but one of [the Court's] recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." [21] See also *Lemon* v. *Kurtzman*, 403 U.S. 602, 621 (1971) (provision of direct aid to nonpublic schools was a "factor [that] distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school"); *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970) (noting difficulties presented by "direct money subsidy" program).[22]

As discussed at pages 7-8, *supra*, Title I and the implementing regulations are carefully designed to ensure that no financial aid, materials, or services are provided to the nonpublic schools themselves. This is in accordance with clear congressional directives from the

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Resources that are inherently secular may be used by nonpublic school authorities so long as nonpublic school students are treated on an equal basis with public school students. *Id.* at 240-241; *Regan*, 444 U.S. at 654-657; *Meek*, 421 U.S. at 359-362. Here, the problem of distinguishing between inherently secular materials and materials that can be diverted to religious use does not arise; all Title I resources are selected by and remain under the exclusive control and direction of public school authorities.

[21] The sole exception is *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, which involved a government aid program designed exclusively for the benefit of parents with children in nonpublic schools, rather than a general program for the benefit of all schoolchildren.

[22] Of course, even a direct governmental subsidy to a parochial school is not necessarily unconstitutional. See *Committee for Public Education & Religious Liberty* v. *Regan*, *supra*; *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, 403 U.S. 672 (1971). Cf. *Marsh* v. *Chambers*, *supra* (upholding constitutionality of direct government payments to legislative chaplains); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (upholding constitutionality of federal aid to hospitals operated by a religious order).

beginning of the program. See S. Rep. 89-146, *supra*, at 11. Most important is the requirement that Title I funding be used "only to provide services that supplement the level of services" that would otherwise be provided to the eligible schoolchildren. 34 C.F.R. 200.72(a); see 20 U.S.C. 2736(c), 3807(b).[23] The "supplement, not supplant" provisions of the law ensure that Title I will not relieve the nonpublic[24] schools of any of their educational and financial obligations. The record shows that, in deciding what Title I services to provide, the Board "has been guided by the statutory requirement that those services supplement, and not supplant, instruction and instructional services already being provided by the nonpublic schools themselves." J.A. 44; C.A. App. A39.[25]

In conclusion: two district courts have engaged in a searching investigation and analysis of the actual "effects" of the New York City program at issue here. Guided by the precedents of this Court, they concluded that that program does not have the impermissible effect

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[23] Local educational agencies are also required to maintain administrative control of all equipment and supplies acquired with Title I funds. 34 C.F.R. 200.74(a); see S. Rep. 89-146, *supra*, at 12. Cf. *Wolman* v. *Walter*, 433 U.S. at 250 (loan of instructional materials and equipment to nonpublic school students invalid because, as a practical matter, the materials would be available for use by the religious schools). Title I teachers are instructed to keep such equipment and supplies, when not being used, locked in separate storage. The record in this case shows that the New York Title I program fully complies with these requirements. J.A. 55-57; C.A. App. A51-A53.

[24] It should be noted that the "supplement, not supplant" provisions apply to *public* schools as well. See 20 U.S.C. 2736(c), 3807(b); 34 C.F.R. 200.62; see also *Bell* v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984). Congress intended that Title I funds only be used to improve the education of disadvantaged children, and not be "diverted to meeting other needs of school systems, however pressing those other needs may be." S. Rep. 91-634, 91st Cong., 2d Sess. 10 (1970); see also *id.* at 14.

[25] For example, the Board decided against providing speech improvement and library services because of the danger that these services might constitute aid to the institutions rather than to children. J.A. 44; C.A. App. A39.

of advancing religion. "[T]he substantial evidentiary record compiled in this case * * * demonstrates to the Court's satisfaction that the program has remained free from religious influence and has not promoted the religious mission of the nonpublic schools" (*PEARL*, J.S. App. 85a). The court of appeals did not disturb this finding, and it should be upheld by this Court.

3. *Entanglement.* The Title I program is so structured that there is no jurisdictional overlap between public and religious authorities, and little contact between them. Public authorities exercise no control over the activities or personnel of the religious schools (in contrast to *Lemon* v. *Kurtzman, supra*) (J.A. 62; C.A. App. A58; see J.S. App. 99a), and the religious school authorities exercise no control whatsoever over the activities or personnel of the Title I program (J.A. 46-49, 52-55; C.A. App. A41-A44, A48-A51). The result is that there is no "excessive entanglement" between religious and governmental authorities.

The three-judge district court in *PEARL* aptly described the provision of services to nonpublic school students here as a "school within a school." J.S. App. 98a, quoting Larkin Affidavit ¶ 107, DX U, Tab A-4. The court found that the Title I classrooms "are free from religious influences and are distinct from the facilities used by the nonpublic school for regular instructional activities." J.S. App. 98a. The court further found that "Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools." *Id.* at 98a-99a.

The testimony of Title I administrators, teachers, and support professionals in this case shows that Title I personnel are given guidelines stressing the program's independence from the nonpublic schools. They are instructed that the Title I program is separate from and independent of the nonpublic schools' program, and that, as public employees, their role is purely public and secular. This uniform testimony, of record in this case, demonstrates that the Title I personnel fully comprehend and

strictly adhere to these guidelines restricting their own activities and the use of materials, and that they view the Title I remedial program and their role as independent of the instructional program of the nonpublic schools. See J.A. 50-51, 52-55; C.A. App. A45-A46, A48-A51; *PEARL*, J.S. App. 97a.

The few administrative contacts between Title I personnel and the teachers or officials of the nonpublic schools do not constitute excessive entanglement. These contacts fall into three categories: (1) disseminating information about Title I to the administrators, (2) processing requests for services, and (3) resolving scheduling problems and other questions concerning the implementation of the program (J.A. 59; C.A. App. A55). These routine administrative interactions do not give parochial school officials any control over the program, nor involve Title I personnel in the affairs of the parochial schools. *PEARL*, J.S. App. 100a. The Title I supervisors have only casual and periodic contact with nonpublic school administrators and little, if any, contact with nonpublic school teachers. Title I supervisors review and evaluate only the performance of the Title I teacher in the Title I classroom, and neither the parochial school program nor its instructional material is subject to public examination. *PEARL*, J.S. App. 99a; see generally J.A. 59-63; C.A. App. A55-A59.

These minimal contacts scarcely reflect the degree of intrusiveness by government authority that this Court has cautioned against as amounting to impermissible entanglement. Cf. *Walz* v. *Tax Commission*, 397 U.S. at 674-676 (routine administrative contacts between government and religiously affiliated institutions do not constitute entanglement); *Mueller* v. *Allen*, slip op. 14 (same). And, as the Court explained in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 660-661 (1980) (footnote omitted), when the administrative contacts are of the kind that are "straightforward and susceptible to * * * routinization," there is no excessive entanglement on the face of the plan, "and

we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." [26]

There remains the question whether the *prevention* of impermissible effects in this context has brought about "[a] comprehensive, discriminating, and continuing state surveillance," such as would constitute an excessive entanglement under this Court's decision in *Lemon* v. *Kurtzman*, 403 U.S. at 619. It is this aspect of the entanglement inquiry—and this aspect alone—that caused the court of appeals to conclude that, despite the practical educational considerations and the weight of congressional judgment, remedial instruction and related counseling services may be provided to students attending religiously oriented schools "only if such instruction or services are afforded at a neutral site off the premises of the religious school" (J.S. App. 35a-36a).

The court of appeals concluded that to "be sufficiently certain that public employees, in a program like the present one, will maintain strict religious neutrality, they and the institutions in which they work must be subjected to 'comprehensive, discriminating and continuing state surveillance.'" J.S. App. 36a, quoting *Lemon* v. *Kurtzman*, 402 U.S. at 619. This need for surveillance arises, according to the court, because "[t]eachers and those who provide clinical and guidance services of the sort here at issue are engaged in occupations in which the performance of one's duties may be subtly and all too easily influenced by a sectarian milieu." J.S. App. 36a (footnote omitted). See also J.S. App. 38a (problem is that a public school teacher may "succumb[] to, or indeed em-

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[26] The consultations between Title I teachers and regular private school teachers "concerning the students' needs and progress" (J.S. App. 12a) would occur even if Title I classes were taught solely on the premises of public schools. Any public welfare agency that deals with a sectarian school student may have occasion to consult with his teachers. Such unexceptional professional contacts between public and private authorities have never been thought to give rise, as a matter of law, to unconstitutional government entanglements with religion.

brace[], the religious influences that bear on anyone offering instruction or guidance in rooms that are part and parcel of a religious school").

In so holding, the court did not rely on the record evidence. The opinion of the court includes no reference to any evidence concerning the actual level of "surveillance" involved in the Title I program.[27] Indeed, the court expressly declined to address "the merits of th[e] argument" that the record here affirmatively negates any supposition of an excessive degree of entanglement stemming from such surveillance (J.S. App. 53a). The holding below was based entirely on the court's "reasoned apprehension of potentials" (J.S. App. 41a) and—more directly—on an analogy to this Court's decision in *Meek* v. *Pittenger, supra.*

There is a striking incongruity between the weighty considerations supporting this important program and the court's speculative, even chimerical, basis for striking it down. With all respect, we believe that the esoterica of the court of appeals' First Amendment jurisprudence have gotten in the way of the ultimate inquiry—whether the program here "establishes a religious faith, or tends to do so." *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8-9. The concerns of the court of appeals, if they are real at all, seem exceedingly remote from the purposes of the Establishment Clause. As explained in *Lemon* v. *Kurtzman*, 403 U.S. at 614, the purpose of the "entanglement" inquiry is "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." Justice Brennan has further explained that this purpose is "to keep the state from interfering in the essential autonomy of religious life." *Marsh* v. *Chambers*, slip op. 9 (dissenting opinion). The concern about intru-

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[27] Interestingly, appellees agree with us that the degree of surveillance occasioned by the New York Title I program is minimal. See Appellees' Motion to Affirm or Dismiss 11, 33-34, 38. If appellees are correct, then the program cannot be invalidated on the basis of excessive entanglement stemming from prophylactic surveillance. If there is a constitutional infirmity, it must be found in the program's effects. But see pages 28-33, *supra.*

sive surveillance is simply one element bearing on this purpose. It was first identified in *Lemon* v. *Kurtzman*, *supra*, in the context of cash salary supplements for *full-time religious school teachers*. There, the surveillance in question pertained to individuals "under religious control and discipline" (403 U.S. at 617); in a very real and direct sense, the surveillance constituted "excessive and enduring entanglement between state and church" (*id.* at 619). The government has no business overseeing the agents of the church to ensure that they do not commit religion.

By contrast, the surveillance at issue here involves only *public school* teachers and *public school* authorities.[28] Such surveillance obviously entails no relationship between the government and religious authorities. It is no different, in principle, from the "surveillance" that may be necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions. The Constitution does not prohibit entanglement between the government and its employees.[29]

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[28] The court of appeals also mentioned surveillance of "the institutions in which [the teachers] work" (J.S. App. 36a). We do not know what the court was referring to. The record affirmatively demonstrates (J.A. 62; C.A. App. A58) that the public school authorities did not interfere with "the nonpublic schools' control over their internal affairs, curriculum, course content, or faculty qualifications or performance." Perhaps the court was concerned by the prospect of Title I supervisors " 'prowling the halls' " of the nonpublic schools (J.S. App. 43a, quoting *Lemon* v. *Kurtzman*, 403 U.S. at 650 (Brennan, J., concurring)). However, the record does not reflect any friction caused by the occasional visits by Title I supervisors to Title I classrooms, and the "entanglement" resulting from these visits would seem to be less intrusive than that occasioned by public regulatory programs, such as state accreditation requirements or fire and building safety codes. The nonpublic school has no obligation under Title I other than to supply a classroom in specified condition and to allow access to that classroom by teachers and supervisors; there is accordingly no reason for a Title I supervisor to examine anything other than that classroom.

[29] In *Wolman* v. *Walter*, 433 U.S. at 246-248, this Court upheld off-premises remedial instruction by public school teachers of classes composed entirely of sectarian school students. There is

The court of appeals' approach to the entanglement issue was marked by another, analytical, flaw. The question of "excessive entanglement" is, inevitably, a correlative of what is necessary to prevent impermissible "effects." The question is whether the prevention of an impermissible effect ("advancing religion") entails an excessive degree of entanglement. In this case, this reduces to the specific issue of what sort and degree of "surveillance" is necessary to prevent trained public school professionals from "succumbing" to the "sectarian milieu" of the nonpublic school. This is fundamentally an empirical question. It simply cannot be answered on an a priori basis. And where, as here, there is an extensive factual record bearing on the issue, it is a profound mistake to refuse to examine the evidence and to rely on conclusory presumptions about the degree of surveillance that *might be* necessary to prevent the teachers from "succumbing" and turning the Title I program into a forbidden advancement of religion. See J.S. App. 39a.

The court of appeals did not seriously suggest (and appellees do not contend) that the degree and kind of surveillance that was actually carried out in New York City over the Title I teachers now teaching in private schools constituted an excessive entanglement.[30] Nor did the court find any impermissible "succumbing." But if the present degree of surveillance does not constitute an excessive entanglement, and has not in fact had imper-

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no reason to presume that, merely because such a class is conducted on nonpublic school premises, the government's supervision of its own employees would become an "excessive entanglement" with religion.

[30] A certain degree of surveillance or entanglement is tolerable and may be inevitable. "The test is inescapably one of degree." *Walz* v. *Tax Commission*, 397 U.S. at 674; see *Lynch* v. *Donnelly*, slip op. 14. Only entanglements that are "excessive" are proscribed. *Mueller* v. *Allen*, slip op. 14; *Lemon* v. *Kurtzman*, 403 U.S. at 613. This corresponds to the fact that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch* v. *Donnelly*, slip op. 13 (brackets in original), quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 771.

missible effects, why should we presume that much more surveillance is necessary to prevent these effects?

A purely hypothetical approach to both effects and entanglement has the result of invalidating any program of assistance to religious institutions or individuals attending them. Cf. *Wolman* v. *Walter*, 433 U.S. at 262 (Powell, J., concurring in part). Where a program has operated for 16 years or more without any untoward consequences, and this has been accomplished without "comprehensive, discriminating and continuing state surveillance" (*Lemon* v. *Kurtzman*, 403 U.S. at 619), it suggests very strongly that entanglement problems are largely imaginary.

4. *The Authority of Meek v. Pittenger.* The court of appeals based its conclusion that the New York City Title I program is unconstitutional on what it deemed to be the compelling authority of *Meek* v. *Pittenger, supra.* J.S. App. 4a.[31] Moreover, the court felt that *Meek* required that it so hold *without* examining "the merits of th[e] argument" that the surveillance of the public school teach-

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[31] The court of appeals stated (J.S. App. 4a) that it also relied on *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd, 417 U.S. 961 (1974), and *Wolman* v. *Walter, supra.* Neither precedent supports the result below.

Marburger, a summary affirmance, involved a program in which public funds were provided to nonpublic schools to enable *them* to hire public school personnel for remedial services they deemed appropriate. The *Marburger* program, therefore, was essentially under the control of the religious school authorities rather than the public schools. The program here is plainly distinguishable. See pages 30-32, 33, *supra.*

Wolman v. *Walter, supra*, does not support the court of appeals' rigid interpretation of *Meek*. Indeed, the Court in *Wolman* upheld the provision of diagnostic educational services by public school personnel on the premises of nonpublic schools, as well as the provision of other remedial educational services to nonpublic school students at ideologically neutral sites off the premises. The *Wolman* decision thus supports our view that questions of this sort must be decided on the basis of a flexible and careful analysis of the practical realities of the situation, rather than on inflexible per se rules. See pages 40-41, *infra.*

ers in this case did not rise to the level of impermissible entanglement (J.S. App. 53a).

Even if the court of appeals were correct that *Meek* compels a lower court to reach so unfortunate a result (and we think it was not), this Court is not so constrained.[32] *Meek* may well provide a close factual analogy to this case. But there is every reason to hesitate before reading *Meek* as an irrevocable commitment to a rigid per se rule barring the lower courts from conducting an inquiry into the actual facts and realities of particular on-premises programs. Just one year before *Meek*, in *Wheeler* v. *Barrera*, *supra*, the Court was faced with the question of the constitutionality, in the abstract, of an on-premises Title I program. The Court declined to decide the question in the abstract, stating that it should be decided on the basis of "a careful evaluation of the facts of the particular case." 417 U.S. at 426. The Court observed that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Ibid.* The Court stated that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week." *Ibid.* A rigid interpretation of *Meek* would, however, render any such considerations irrelevant. We seriously doubt that the Court, one year after being so cautious in *Wheeler*, intended in *Meek* to adopt a per se rule that effectively preordains the outcome of this and every other on-premises case.

Two terms after *Meek*, in *Wolman* v. *Walter*, *supra*, the Court demonstrated that it did not view *Meek* as precluding analysis of the facts of the particular case. There, the Court addressed the constitutionality of pro-

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[32] If this Court were to conclude that *Meek* cannot be distinguished from this case, we believe that it would be appropriate for the Court to consider whether *Meek*, as so interpreted, should be overruled.

viding diagnostic services to nonpublic school students on the premises of their schools. An absolutist interpretation of *Meek*—*i.e.*, that the danger of public school personnel succumbing to the sectarian atmosphere of the church-related school is so great that constitutionally excessive surveillance is necessarily required to prevent it—would logically have resulted in invalidation of the program. But the program was in fact upheld. 433 U.S. at 241-244. And the provision of therapeutic services in "religiously neutral locations" was upheld simply because of the Court's judgment, on the record, that "the danger perceived in *Meek* does not arise" in such circumstances. *Id.* at 247. The Court recognized the importance of a "*practical response* to the logistical difficulties of extending needed and desired aid to all the children of the community" (*id.* at 247 n.14) (emphasis added)).

More recently, in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. at 661 (citations omitted), this Court explicitly rejected the broad interpretation of *Meek* on which the court below relied:

> *Meek* v. *Pittenger* * * * is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities. * * * [T]hat case was simply not understood by this Court to stand for [such a] broad proposition.

We therefore seek an understanding of *Meek* that is narrower and more consistent with this surrounding legal texture. In this spirit, we note several significant differences between *Meek* and the instant case. First, the Title I program is governed by detailed regulations and guidelines that are made known to Title I personnel and the nonpublic schools as well. See pages 6-8, 12, *supra*. This has the beneficial effect of routinizing the conduct of the program and eliminating the need for ad hoc judgments about the relations between the religious school and the Title I program. See *Regan*, 444 U.S. at 660 (upholding

program where it is "straightforward and susceptible to routinization"). In sharp contrast, the program in *Meek* (as the Court observed) had "the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction." 421 U.S. at 372 n.22.

Second, the Title I program is designed to be a flexible means for accomplishing an important public purpose. On-premises programs are permitted only to the limited extent necessary to fulfill those purposes. The record here shows that New York adopted the on-premises approach only as a last resort. See pages 9-11, *supra*. By contrast, the Pennsylvania program at issue in *Meek* was limited by statute to on-premises services. See 421 U.S. at 367 ("the services are provided only on the nonpublic school premises"). This factor bears heavily on whether the decision to provide on-premises services is made on truly educational grounds, rather than for the convenience or assistance of the nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. at 428 (Powell, J., concurring) (emphasis added) ("I would have serious misgivings about the constitutionality of a statute that *required* the utilization of public school teachers in sectarian schools.").

Third, the Title I program is a single statutory scheme that provides aid to students in both public and nonpublic schools according to a fixed statutory formula. See 20 U.S.C. 3806(a). This obviates any possibility that the program might foster chronic controversy over the amount of aid to be given to nonpublic school students. In fact, in its nearly 20 years of operation, Title I has not precipitated religious debate in the political arena; the concept of equitable treatment of nonpublic school students has enjoyed widespread and virtually unanimous support.[33]

[33] The three-judge court in *PEARL* found that the evidence showed no political divisiveness over the inclusion of nonpublic school students in the New York Title I program. J.S. App. 101a-102a. Nor has there been such divisiveness at the federal level. Equitable participation by nonpublic school students was an in-

By contrast, the program in *Meek* established aid for public and nonpublic school students through separate statutory schemes requiring separate annual appropriations decisions. See 421 U.S. at 352, 372. This created risks of "repeated confrontation between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id.* at 372).

Finally, the most important distinction between this case and *Meek* is the procedural posture in which the two cases arose. This case comes to the Court after a full trial on the merits by two district courts, with an extensive factual record covering a period of 16 years of Title I operations. By contrast, *Meek* came to this Court on review of a decision by a three-judge district court, upholding the program on a sparse evidentiary record. Because the *Meek* program had been in existence for barely a year at the time of the sole evidentiary hearing, the record contained little about its actual operation.

In *Meek*, therefore, this Court was asked to rely on the "good faith" and professionalism of the Pennsylvania teachers. 421 U.S. at 369. Here, the Court has the benefit of a record that demonstrates that Title I personnel "*have not* fostered religious views or advanced religious

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trinsic requirement of the program at its inception in 1965 (see S. Rep. 89-146, *supra*, at 11-12). Since that time, Congress has twice amended Title I to strengthen the nonpublic school participation requirement. See pages 5-6, *supra*. There has never been any serious effort in Congress to depart from this aspect of the program. It can be expected that a forced exclusion of nonpublic school students from equitable participation in the Title I program would engender far more controversy than has their inclusion.

If the potential for "political divisiveness" is considered to be a "warning signal" for entanglement problems (see *Nyquist*, 413 U.S. at 797-798), then the rare and striking unanimity in the Congress that nonpublic school students should be permitted to participate in the Title I program on a comparable basis to public school students might logically serve as a "reassuring signal" that this program steers clear of the "evil[s] addressed by the Establishment Clause" (*Lynch* v. *Donnelly*, slip op. 3 (O'Connor, J., concurring)).

activities" (*PEARL*, J.S. App. 97a (emphasis in original)). As the district court below stated (J.S. App. 56a-57a):

> although arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demonstrates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional governmental activity inherent in the arrangements of this program.

D. The Court Of Appeals' Reasons For Refusing To Consider The Evidentiary Record Were Misconceived

The court of appeals offered a litany of reasons why its hypothetical conclusion of excessive entanglement should not "yield to the considerable evidence concerning the actual workings of the City's provision of on-premises remedial instruction and guidance services" (J.S. App. 37a). None of them can withstand analysis.

The court first opined (J.S. App. 38a) that the failure of the record to reflect evidence that Title I was in fact used to foster religion merely shows that it is difficult to "prove a negative"; in the same vein, the court later (J.S. App. 41a) asserted that to rely on the fact that "no harm has been proved to have been done in the past is a fundamentally wrong approach," that there is "no guarantee" that the secular approach of the current Title I administrators will continue, and that the plaintiffs cannot be "expected to mount perpetual guard." These statements demonstrate, we believe, that the court of appeals arbitrarily reallocated the burden of proof in this case to defendants, in order to spare the plaintiffs the necessity of proving, now or in the future, the existence of unconstitutional practices. But there is no warrant in law for such a reallocation of the burden of proof.

It is particularly inappropriate here because it leads to a presumption of the unconstitutionality of a major congressional program. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 354-355 (1936) (Brandeis, J., concurring); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819).[34] And, as already detailed, this Court has clearly indicated in *Wheeler* v. *Barrera*, *supra*, that a "careful evaluation of the facts" of the particular case is not only appropriate but necessary.[35]

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[34] The court of appeals also objected that appellants' arguments based on the record "too often invoke 'mosts' and averages" (J.S. App. 40a), pointing particularly to the figures (see page 11, *supra*) with respect to the religious affiliations of Title I teachers and the amount of time they spend in any particular religious school. But the fact that these figures fall short of perfection simply raises the question whether the district court's findings of fact were clearly erroneous; they do not suggest that the evidence is to be wholly disregarded. Indeed, the most important circumstance shown by all these figures is that religion is wholly extraneous and irrelevant to the administration and operations of the Title I program. The fact that, on a random basis, occasionally a public school teacher who happens to be Catholic will end up teaching Title I remedial math in a Catholic school does not show that religion has been "established," in the absence of at least some modicum of *evidence* that remedial math has in fact been turned to a religious use. The legal question is not whether the record absolutely precludes entanglement, but whether it shows with "sufficient clarity" that the program serves "legitimate secular ends" without "appreciable risk of being used to transmit or teach religious values." *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. at 662.

[35] See also *Board of Education* v. *Allen*, 392 U.S. at 248 (emphasis added):

> *Nothing in this record* supports the proposition that all textbooks * * * are used by the parochial schools to teach religion. *No evidence has been offered* about particular schools, particular courses, particular teachers, or particular books. *We are unable to hold, based solely on judicial notice*, that this statute results in unconstitutional involvement of the State with religious instruction or that [the statute], for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

The court further expressed the fear that "to relax" the "ban on sending public school teachers and counselors into religious schools * * * would let the genie out of the bottle" (J.S. App. 42a (footnote omitted)). Without "a principled basis on which this Court can impose a limit," the court of appeals predicted, "[c]onsiderable segments of the curriculum of the religious schools could be turned over to public school teachers" (J.S. App. 42a-43a). But there is no substantial basis for the assertion that, if the on-premises Title I program is upheld, there will remain no "principled basis" for imposing a limit. The correct line, we believe, is to permit federal aid to go on an evenhanded basis to all students as long as the provision of services is strictly supplemental and totally in the control of public authorities. The vice of promoting religion is avoided so long as the program is supplemental and evenhanded and resources that might be diverted to religious ends are not placed in the control of religious institutions. And the vice of excessive entanglement is avoided so long as there is no mixture or overlap of jurisdictions. The government must have no control over religious institutions or personnel; the religious institution must have no control over public programs or personnel. So long as these principles—which lie at the heart of this Court's Establishment Clause jurisprudence—are honored, there is little danger of the slippery slope.

The court of appeals also stated (J.S. App. 43a) that "the symbolic significance of the regular appearance of public school teachers in religious schools" may be cause for invalidating the program, suggesting that this may violate "the 'neutrality' test toward religion." But the answer is that given by the Court in *Everson*, *Allen*, *Zorach*, *Mueller*, *Widmar*, and like decisions: the government does not violate its obligation of neutrality by treating all students equally. The "symbolic significance" of evenhanded treatment of all students, we believe, exemplifies rather than subverts the spirit of the Religion Clauses. In fact, what would be deeply troubling is the

"symbolic significance" of denying access to effective remedial education for deprived youngsters who have exercised their constitutional right to choose a religious education.

E. To Deny Comparable Services To Nonpublic School Students Would Be Inconsistent With The Religion Clauses' Principles Of Evenhandedness And Accommodation

The decision of parents to send their children to nonpublic schools is, in part, an exercise of religious liberty, protected under the Free Exercise Clause of the Constitution. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Their decision is entitled to respect, to toleration, to accommodation. Here they ask no more than that they not be *excluded* from a major program otherwise open to all—that they be accorded the "equitable participation" in Title I that the statute demands. Cf. *Widmar* v. *Vincent, supra.* Accommodation of these children by providing remedial services in the manner that is most effective as an *educational* matter is not special preference; it is simple justice. It promotes "pluralism and diversity" (*Lynch* v. *Donnelly*, slip op. 8)—the very goal and hallmark of the Religion Clauses—in the field of education.

Conversely, to deny these needed services to disadvantaged religious school pupils is to burden their exercise of a constitutional right. It generates more constitutional problems than it solves. Cf. *Sherbert* v. *Verner*, 374 U.S. 398, 404-406 (1963).

The Establishment Clause plays a harmonious role in the regime of religious liberty enshrined in our Constitution. To interpret it in so rigid and intolerant a spirit as to interfere with, rather than promote, that liberty would surely affront the intentions of the framers. It would be the ultimate constitutional irony if, in the name of one of the Religion Clauses, educationally deprived children were to be denied benefits which are central to many aspects of a successful life solely because of choices that are themselves constitutionally protected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Consolidated With Nos. 84-238, 84-239

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Appellees.

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On Appeal from the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The interests of the USCC include the areas of education, social welfare, health and hospitals, family life, immigration, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its views in litigation touching issues pertinent to its activities, particularly when they affect the organizations and people of the Catholic Church in the United States.

Over the past nineteen years, pursuant to Chapter 1 of the Education Consolidation and Improvement Act and its predecessor, Title I of the Elementary and Secondary Education Act,[1] the New York City Board of Education has provided remedial education to economically and educationally deprived children in both public and private schools, including religiously affiliated schools. With respect to the latter, after comprehensive study and experimentation with other formats, the City of New York concluded that an on-premises program of remedial instruction maximizes the educational benefits made available by Congress. The United States Court of Appeals for the Second Circuit has held that this on-premises program violates the Establishment Clause of the First Amendment,[2] thereby frustrating the will of Congress and its implementation by New York City. A reversal of that decision would enable school districts to decide how best to implement Congress' goal of quality education for all children without regard to the public or private character of their schools.

Through their counsel, all parties consent to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

The Court's most recent decisions have contributed new cogency to Establishment Clause analysis through

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[1] On July 1, 1982, the Elementary and Secondary Education Act (ESEA) of 1965 was amended and superseded by the Education Consolidation and Improvement Act (ECIA) of 1981. Pub. L. No. 97-35, 95 Stat. 464, Title V, Subtitle D (1981). Chapter 1 of the ECIA incorporated by reference most provisions of Title I of the ESEA which were the subject of this lawsuit when filed in 1978 and includes identical provisions governing participation of private school students. *See* 20 U.S.C. § 3803 (1982). Although the ESEA was amended and superseded by the ECIA during the pendency of this action, the parties and the court of appeals have referred to the program as "Title I." This *amicus* will do likewise.

[2] U.S. Constitution Amendment 1 provides in pertinent part that "Congress shall make no law respecting an establishment of religion . . ."

an appropriate and essential emphasis on the authentic purposes of the Establishment Clause, according to "what history reveals was the contemporaneous understanding of its guarantees." [3] *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. 1355, 1359 (1984). *See Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3069 (1983).

In service to the Court, in *Mueller v. Allen, supra*, this *amicus* examined the precise generative and legislative history of the Establishment Clause, as well as the "primary effect" component of the three-part test in light of this history. In *School District of Grand Rapids v. Ball*,[4] this *amicus* has applied its analysis in *Mueller* with particular emphasis on the "secular purpose" criterion as the analytical vehicle for giving due recognition to government's responsibility to forge and implement policy for the public welfare, unimpeded by vague and conjectural constitutional objections. It also suggested an analytical identity between the "primary effect" and "excessive entanglement" criteria. Here this *amicus* focuses more particularly on the meaning of "excessive entangelement", and its analytical identity with "primary effect", as but an alternate means to judge whether state action impermissibly advances or inhibits religion.

The Establishment Clause was intended to prevent the new federal government from prescribing, approving or interfering in religious belief, practice, or governance. The Establishment Clause and the Free Exercise Clause

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[3] Chief Justice Burger in his separate opinion in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 802 (1973) indicated that "experience and history" rather than "logic" form the premise for this Court's treatment of Establishment Clause issues. This theme is reinforced by this Court's opinion in *Lynch v. Donnelly*, reemphasizing the importance of history in constitutional analysis. —— U.S. ——, 104 S.Ct. 1355, 1359 (1984).

[4] School District of Grand Rapids v. Ball, *cert. granted*, 104 S.Ct. 1412 (1984) (No. 83-990).

were united to achieve those ends. However, "hermetic separation" of church and state was not required. *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976). Church and state have served and continue to serve many important public interests in common, including education, and their involvement with each other to this day are many and varied. To distinguish valid from invalid involvements, this Court has developed the well-known three-part test of purpose, effect and entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) [hereinafter *Lemon*].[5]

The reliance of the court below on "excessive entanglement" calls for a critical reassessment of that branch of the three-part test. That phrase connotes only particular kinds of church-state involvement which are "fraught with the sort of entanglement that the Constitution forbids." *Lemon*, 403 U.S. at 620. In light of the authentic objectives of the Establishment Clause, entanglement becomes excessive, hence invalid, when the state becomes involved in matters of religious belief, practice, or governance. When that occurs, the state is in a position to sponsor or interfere with religion. *See Roemer v. Board of Public Works*, 426 U.S. at 747-48. Such state actions raise the spectre of establishment as that term was understood by the Framers, with consequent potential burdens on individual liberty. In the absence of such involvement, there is no state activity that may properly be considered as "excessive entanglement" in a proper constitutional sense. Unless "excessive entanglement" is firmly grounded in authentic constitutional values, it can cause the invalidation of important government programs despite the absence of genuine mischief.

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[5] As stated in *Lemon* v. *Kurtzman* [hereinafter *Lemon*], the three part test is: first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster *excessive government entanglement with religion.* 403 U.S. 602, 612-13 (1971) [emphasis added].

There is an intimate connection between "primary effect" and "excessive entanglement". This Court in *Roemer* came very close to making the connection outright when it referred to "primary effect" and "excessive entanglement" as, respectively, the "substantive" and "procedural" sides of the same effects analysis. *See* 426 U.S. at 755-63. Under either criterion, the court must evaluate whether the state action "sponsors" (advances) or "excessively interferes with" (inhibits) religion. *Id.* at 747-48. Both are directed at the same ills, namely establishment with its inherent threat to religious liberty. Further clarification of this Court's evaluative criteria could simplify the analytical process and avoid results, like that on review here, whereby important legislative programs are stricken without basis in authentic constitutional values.

In words especially suited to this case, Chief Justice Marshall counselled: "But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability [sic] with each other." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). Acts of the Congress should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871). In its more recent Establishment Clause decisions, the Court has stressed that a declaration of unconstitutionality should occur only when, by realistic measure, the state is clearly and directly involved in religion. *See, e.g., Lynch v. Donnelly*, 104 S.Ct. at 1361. "[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330, 3337 (1983). "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitu-

tion. It is not sufficient for them that they succeed in raising a doubt." *Legal Tender Cases*, 79 U.S. at 531.

These principles rest upon important constitutional and policy grounds. The constitutional authority to resolve public debates over which actions should be undertaken to promote the public welfare is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). The Congress' resolution of the public interest should never lightly be set aside, especially when there is room for legitimate disagreement in setting the course of public policy. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557-58 (1978); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261-62 (1964).

The court below annulled Congress' judgments and the City's carefully considered implementation of Title I, and dismantled a remedial educational program which the court conceded "has done so much good and little, if any, detectable harm." *Felton v. Bell*, 739 F.2d 48 (2d Cir. 1984), S.G. App. 52a.[6] It did so because it perceived "excessive entanglement" in one minor aspect of the program whereby public school supervisors review the classroom work of Title I teachers. S.G. App. 35a-36a, 38a-39a. That supervision, among other things, is for the professional evaluation and development of the teacher. Because it also serves to assure that Title I courses are not used to advance religious views of the host school, the court said "this very surveillance constitutes excessive entanglement, even if it has succeeded in preventing the fostering of religion." *Id.* at 39a. It also suggested that even if the supervision were not "excessive entanglement", it was insufficient to assure with *certainty* that there would be no fostering of religion by Title I teachers. *Id.* Completing the conundrum,

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[6] The opinion below is reproduced in the Solicitor General's Appendix. *See* note 29, *infra*.

the court stated further that to achieve that level of certainty would create "excessive entanglement". *Id.*

There is no evidence in this case of actual or probable state involvement in religious belief, practice, or governance, the effect of which would threaten establishment or preference of religion, or religious liberty. The court's finding of "excessive entanglement" on this record is sheer conjecture which lacks even a trace of identifiable evidentiary support. Its determination can be explained solely by the religious nature of the schools involved. That result cannot be reconciled with the mutuality of objective of the Establishment Clause and the Free Exercise Clause. The decision below should be reversed.

ARGUMENT

I

THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PREVENT THOSE ENTANGLEMENTS BETWEEN CHURCH AND STATE WHICH CLEARLY AND DIRECTLY INVOLVE RELIGIOUS BELIEF, PRACTICE OR GOVERNANCE.

The Court's most recent decisions have contributed new cogency to Establishment Clause analysis through an appropriate and essential emphasis on the authentic purposes of the Establishment Clause, according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 104 S. Ct. at 1359. *See Mueller v. Allen*, 103 S.Ct. at 3069.

In service to the Court, in *Mueller v. Allen*, *supra*, this *amicus* examined at length the precise generative and legislative history of the Estabishment Clause as well as the "primary effect" component of the three-part test in light of this history. In *School District of Grand Rapids v. Ball*, *supra*, this *amicus* has applied the historical analysis of its *Mueller* brief, with particular emphasis on the "secular purpose" criterion as the analytical vehicle for giving due recognition to government's authority to forge and implement policy for the public welfare, unimpeded by vague and conjectural con-

stitutional objections, and suggested an analytical identity between the "primary effect" and "excessive entanglement" criteria. Here this *amicus* builds on its earlier analyses and focuses more particularly on the meaning of "excessive entanglement" and its analytical identity with "primary effect", as but an alternate means to judge whether state action impermissibly advances or inhibits religion.

A. A Program Authorized by Congress and Implemented by State and Local Governments Is Not Unconstitutional Under the Establishment Clause, Unless It Is Clearly Incompatible With the Clause.

In words especially suited to this case, Chief Justice John Marshall counselled:

> The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability [sic] with each other.

Fletcher v. Peck, 10 U.S. at 128. The enduring wisdom of this admonition unites the principles of federalism, separation of powers, and judicial restraint. It fortifies the jurisprudential core for the three-part test. It reinforces the Court's renewed insistence that public acts for the common good shall be upheld save in those rare cases when government has so clearly and directly trenched upon the Establishment Clause that the Court is obliged by constitutional duty to defeat its legitimate social objectives.

Although Chief Justice Marshall wrote in regard to a state constitution, this Court long ago approved his caution and held that acts of Congress should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. In its more recent Establishment Clause decisions, the Court has stressed that a declaration of unconstitutionality should not be predicated on mere possibilities, but only when, by realistic measure, the state is directly and substantially involved in religion. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (plurality). *See also Lynch v. Donnelly*, 104 S.Ct. at 1361; *School District of Abington Township v. Schempp*, 374 U.S. 203, at 308 (1963) (Goldberg, J., concurring). "[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers, supra, quoting, Abington Township v. Schempp, supra.* "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." *Legal Tender Cases*, 79 U.S. at 531. *See generally Hunt v. McNair*, 413 U.S. 734, 736 n.8 (1973).

These principles rest upon important constitutional and policy grounds. The constitutional authority to resolve public debates over which actions should be undertaken to promote the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. at 421-21, 423. The Congress' resolution of the public interest should never lightly be set aside, especially when there is room for legitimate disagreement in setting the course of public policy. *E.g., Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council*, 435 U.S. at 557-58 (nuclear power development); *Heart of Atlanta Motel v. United States*, 479 U.S. at 261-62 (civil rights enforcement). The Congress must decide the wisdom of a particular approach. Appropriate judicial

restraint serves the doctrine of separation of powers, a vital constitutional value which should be made to yield only in the clearest case of a supervening constitutional mandate.

B. The Establishment Clause Reflects the Precise Intent and Judgment of the Framers, Based on History and Experience, That There Should Be No Governmentally Preferred Church and That the Government Should Not Become Involved in Religious Belief, Practice or Governance.

The lamentable European and colonial experience with the entanglement of church and state, and the resulting loss of religious liberty, was a dominant influence on the Framers of the First Amendment. *See Engel v. Vitale*, 370 U.S. 421, 425-429, 432-33 and n.16 (1962); *Torasco v. Watkins*, 367 U.S. 488, 490 (1967).[7] The Religion Clauses were designed to protect religious liberty by guaranteeing that no religion could gain the special favor of the government, and by assuring equality and not mere tolerance of the various religious groups. Equality also required the state to avoid engagement in the religious functions of churches, and to that extent be separated from them.[8]

The meaning and precise objectives of the Establishment Clause clearly emerge when its terms are considered in light of history, in particular the legislative drafting process. The prohibition of an establishment or preference of one or more religions by the new federal government was the precise concern of four of the five

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[7] L. Whipple, *Our Ancient Liberties*, 66-68 (DeCapo ed. 1972). Colonial intolerance was compounded by royal action from time to time as religious fortunes changed in the mother country. James II, for example, denied freedom of worship and closed or diverted colonial churches by Royal decree. B. Long, *Genesis of the Constitution of the United States* 106 (1926).

[8] Whipple, *supra* note 7, at 72. *See also* Report of the Senate Judiciary Committee, S.Rep. No. 376, 32d Cong., 1st Sess. 1-2 (1853).

States which requested such an amendment when they ratified the Constitution.[9] That was the precise objective stated and restated by Madison as sponsor in the House.[10] There was no tension or doubt related to these objectives, but the choice of words to achieve them did engender certain anxieties born of other concerns.

Reference to "national" religion contained in an earlier draft of the clause (*see infra* note 13) evoked fears of an implication that the new government would be "national" and not "federal."[11] More important for present purposes was the concern that through the Religion Clauses the new government might interfere with the autonomy of the states in religious matters, particularly states which countenanced preferred religion to one degree or another.[12] The Religion Clauses that emerged from this

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[9] During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many including Madison believed that religion was not the province of the new government and that further clarification was not needed. III *id.* 330. The religious diversity of the new country made preference politically untenable, argued Madison. *Id. See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

[10] 1 *Annals, supra* note 9, at 432-34, 730-31.

[11] Comments during debtes, *id.* at 731. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause. *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemp. Prcbs. 3, 10 (1949); M. Malbin, *Religion and Politics-The Intention of the Authors of the First Amendment*, 7 (1978); J. Story, *Commentaries on the Constitution of the United States*, 731 (1833).

[12] Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another.

process were a House-Senate compromise.[13] The language finally selected satisfied the major objectives of the recommending states as noted by Madison, but respected the other concerns of his peers.

The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Con-

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[13]

HOUSE LANGUAGE	SENATE LANGUAGE
Madison's Proposal—June 8	September 3
The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.	Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.
Select Committee—July 18	Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
No religion shall be established by law, nor shall the equal rights of conscience be infringed.	Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
Livermore's Language—August 15	Congress shall make no law establishing religion or prohibiting the free exercise thereof.
Congress shall make no laws touching religion, or infringing the rights of conscience.	Final Text—September 9
Ames Language—August 20	Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .
Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.	
Final Text—August 24	
Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.	

COMPROMISE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

gress from interfering with a state's policies with regard to religion.[14] The phrase "respecting an establishment" cannot reasonably be read to mean merely concerning or touching upon religion. Indeed, that was the terminology of a proposal by Mr. Livermore which was eventually rejected by the House.[15] The word "establish" was *consistently* used to refer to federally preferred religion in the amendments recommended by the states, by Madison in the House debates, and in versions of the measure in both House and Senate.

There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to alter the meaning of "an establishment of religion." The language of the Clause does not concern itself with religion in general, but with the particular problem of an establishment of religion. There was no concern expressed during the House debates that Congress might enact a law beneficial to religion or religious institutions. 1 *Annals of Congress*, 730-31 (Gales & Seaton eds. 1789).[16] Had this been the concern, it could

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[14] 1 *Annals*, *supra* note 9, at 730-31; *see* Corwin, *supra* note 11, at 11. "Respecting an establishment" meant more than the act of preference but a restraint on Congress' control over practices and beliefs. I A. Stokes, *Church and State in the United States*, 539-40 (1950). Simply put, the "national government was not to play the part of a theologian." W. Dunn, *What Happened to Religious Education?* 47 (1958). As noted Congress was prohibited from passing laws affecting state establishments. *Malbin*, *supra* note 11, at 16.

[15] Note 13, *supra*. Although Livermore's proposal passed on August 15, 1789 without any recorded debate, it was not the language eventually adopted by the House. 1 *Annals*, *supra* note 9, at 731, 765, 778.

[16] As much as the Framers were "utterly opposed to any constraint upon the rights of conscience," they "had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . . [T]hey did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy." S. Rep. No. 376, *supra*

have been dealt with simply by providing that "Congress shall make no law respecting religion", without introducing the more limited concept of "an establishment of religion." [17]

As noted, the drafting process reflected the Framers' experience with the historical realities of church-state entanglement. About half a century later, the Senate Judiciary Committee also reflected that experience when it rejected a citizens' petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion". In its Report in 1853, the Committee explained that "establishment of religion . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1853). It meant:

> The connexion [sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause. This description strikingly parallels that found in recent deci-

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note 8, at 4. *See Zorach* v. *Clausen*, 343 U.S. 306, 312 (1952). Similarly, in *Marsh* v. *Chambers*, this Court reviewed actions of the First Congress which were beneficial to religion. —— U.S. ——, 103 S.Ct. 3330, 3333 (Chaplains), 3334 n.9 (Thanksgiving Holiday) (1983). *See also* Northwest Ordinance, Art. III, Ch. VIII, 1789 Stat. 50, 53; C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment*, 126 (1963).

[17] It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon*, 403 U.S. at 612. However, as demonstrated, such terminology was rejected by the First Congress for the reasons discussed in text, *supra*.

sions such as *Lynch v. Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring) and *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982).

C. "Excessive Entanglement" Must Draw Its Meaning From History and Experience. It Exists When Government Is Involved in Religious Belief, Practice, or Governance. When It Is Not So Rooted, It Can Lead To The Invalidation of Government Programs Which Do Not Threaten Authentic Constitutional Values.

Because of the numerous mutual interests and resultant contacts between churches and the state,[18] hermetic separation has never been and could never be required by the Court. *Roemer v. Board of Public Works*, 426 U.S. at 745-46; *Abington Township v. Schempp*, 374 U.S. at 294-296 (Brennan, J., concurring). As this Court said in *Lynch v. Donnelly*, "[t]he concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." 104 S.Ct. at 1359. In measuring conformity to the mandate of the Establishment Clause, this Court has required a determination whether challenged action results in "excessive government entanglement with religion." *Walz v. Tax Commission of New York*, 397 U.S. 664, 674 (1970). The test, the Court said, is "inescapably one of degree". *Id.* However, accommodation of activities of churches, especially in education, has been a reality since colonial times without serious threat

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[18] Church and state share common interests in education, hospitals, child welfare, matrimony, public welfare and other areas too numerous to mention. Wherever church and state share an interest, involvement of one with the other is likely to follow. When churches engage in activities affecting the common good of the community, some state oversight to promote and protect the public interest is expected and, where reasonable, valid. But clearly churches exist to advance religious practices and beliefs; in thse matters the state rarely, if ever, has a valid interest. *See Lynch* v. *Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring).

of "excessive entanglement" in an authentic constitutional sense.

Churches provided the vast bulk of education through the first quarter of the Nineteenth Century. *Abington Township v. Schempp*, 374 U.S. at 238, n.7 (Brennan, J., concurring).[19] Even when public secular schools began to flourish, most of the education was still performed by clergy. *Id.*, *citing*, A. de'Tocqueville, *Democracy in America* 309, n.4 (1831).[20] The evolution of secular education in the Nineteenth Century did not occur because of the Establishment Clause or similar considerations.[21] As public schools began to share the educational burden with church schools, there remained, and still remain, many state involvements with church-related education without any violation of the First Amendment. *Board of Education v. Allen*, 392 U.S. 236, 245-46 (1968).

The state has an indisputable interest in education. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). It appropriately assures itself that all schools, including

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[19] In New England, where church-state connections were strongest, town churches operated the schools. In the more religiously diversified middle atlantic colonies, the various sects each ran their own schools. In the agrarian south, the wealthy were tutored at home; the less fortunate were educated at Anglican charity schools. W. Bower, *Church and State in Education*, 23-24 (1944). *See* W. Dunn, *supra* note 14, 14-17.

[20] The funds for these schools came from taxes, sales of public lands, private donations, and tuition. R. McCarthy, *et. al.*, *Disestablishment a Second Time*, 53-54 (1982). *See* Dunn, *supra* note 14, at 68-69 (discussing *e.g.*, New York).

[21] It was generated by political and cultural conditions: the rapid expansion of the country and its population, the increased ethnic and religious diversity, the enhanced civic education needs of a growing country, and secularization of the culture. Bower, *supra* note 19, at 25-28. Bower notes that the most significant factor was the increasing sectarianism in education which led to its displacement by state systems.

church-affiliated schools, adequately serve the public interest in education. In *Pierce v. Society of Sisters*, this Court recognized the states' authority:

> *reasonably* to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

268 U.S. 510, 534 (1925) [emphasis added]. *See Meyer v. Nebraska*, 262 U.S. 390 (1923). On the other hand, the state may not involve itself to such an extent that its action infringes fundamental constitutional rights, such as the parental prerogative in choosing a particular school, or religious practice or belief. *Pierce v. Society of Sisters, supra*; *Wisconsin v. Yoder, supra.*

The ultimate problem at which "excessive entanglement" is addressed is the nature of "the resulting *relationship* between the government and the religious authority." *Lemon*, 403 U.S. at 615 [emphasis added]. When a state aids church-affiliated schools, this Court has said that the mechanism to assure that the aid will not be diverted to promote a particular religious belief is a "relationship pregnant with involvement." *Walz*, 397 U.S. at 675. It *could* result in "sustained and detailed administrative relationships" having the effect of involving the state in matters of religious belief, practice, or governance. *Id.*; *see Lemon*, 403 U.S. at 621; *Meek v. Pittenger*, 421 U.S. 349, 369-70 (1975). On the other hand, churches "need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works*, 426 U.S. at 746. In *Wolman v. Walter*, Justice Powell noted that the Court had never invalidated a program merely because it had a beneficial effect on religious-affiliated education, when "the aid is wholly secular in character and is supplied to the pupils

rather than the institutions." 433 U.S. 229, 262 (1977); *see id.* at 247, n.14.[22] State administration of a neutral secular program would not threaten "state inspection and evaluation of the religious content of a religious organization . . . fraught with the sort of entanglement that the Constitution forbids." *Lemon*, 403 U.S. at 620. *See Mueller v. Allen*, 103 S.Ct. at 3070, n.10; *Meek v. Pittenger*, 421 U.S. at 368, n.17. *See* note 22 *infra*.

The requirement of impermissible religious involvement suggests analogy to the cases which deal with the adjudication of church-related disputes. This Court has insisted that the First Amendment places ecclesiastical matters beyond the civil courts. *E.g., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Civil authority may not decide religious doctrine, even in resolving what would otherwise be a secular dispute. *Serbian Eastern Orthodox Church v. Milivojevich*, 426 U.S. 696, 703 (1976); *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring). There is the "danger that the state will become *entangled* in essentially religious controversies in violation of the First Amendment." *Serbian Church, supra* [emphasis added]. Thus, this Court has approved a neutral legal principles approach to "free civil courts completely from *entanglement* in questions of religious doctrine, polity, and practice." *Jones v. Wolf*, 443 U.S. 595, 603 (1979) [emphasis added]. This rationale for judicial abstention provides a useful basis for a consistent adjudication of cases which

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[22] For this reason *Wolman v. Walter*, 433 U.S. 229 (1977) is seen as a turning away from some of the strict implications of *Meek v Pittenger*, 421 U.S. 349 (1975). Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 Ohio St. L.J. 783, 789 (1977). Similarly, equal opportunity for aid that is secular in character and available to all children does not raise the same sort of constitutional issue as would aid expressly limited to religious schools or students. *Americans United v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.) (three judge court), *aff'd mem.* 434 U.S. 803 (1977).

deal with legislative and executive involvements in the educational and other activities of churches and other religious organizations.

The tendency toward control of religion is the key to identifying those entanglements at which Madison and others directed the Religion Clauses. They include government involvement, even at the threshold, with established or preferred religion which itself could threaten religious liberty. *See Lynch v. Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring). Properly applied, the "excessive entanglement" criterion can serve legitimate Establishment Clause values. Its aim should be the kinds of involvements which history and experience teach can lead to retrenchment of religious liberty. It should not be the gratuitous foes of educational programs which are untainted in fact by constitutional excess. Where church-state interaction or cooperation does not concretely present the threat that the state may promote or control religious belief, practice or governance, it cannot be deemed "excessive entanglement" in a proper constitutional sense. *See Walz*, 397 U.S. at 669. For such involvements to exceed constitutional bounds, this *amicus* suggests there must be

(a) actual government assertion of authority,

(b) over religious activity,

(c) which actually tends to establish or prefer religion, or adversely affect religious liberty.

A lesser or ambiguous standard, especially where church and state together serve important public interests, leads to the invalidation of programs which serve a legitimate public interest, despite the absence of proven excursions beyond authentic constitutional bounds.[23]

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[23] Examples of such instances include portions of *Meek v. Pittenger*, 421 U.S. at 365 (loan of maps, charts, and laboratory equipment) and *Wolman v. Walter*, 433 U.S. at 253-54 (field trips).

D. The Establishment Clause Was Intended to Buttress the Free Exercise Clause. Applications Which Burden Religious Liberty Are Necessarily Erroneous.

As part of the Bill of Rights, the Establishment Clause was intended to safeguard individual liberty.[24] The same is true under the Fourteenth Amendment which applies the Establishment Clause to the states. *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). As noted above, it reflects the experience of its Framers that officially preferred or established religion generates religious intolerance and infringes upon personal liberty. S. Rep. 376 (1853), *supra*, at 4; *Abington Township v. Schempp*, 374 U.S. at 203, 221-22; *Engel v. Vitale*, 370 U.S. at 429, 430-32; *Torasco v. Watkins*, *supra*. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom. *See, e.g., Lynch v. Donnelly*, 104 S.Ct. at 1364.

The invalidation of governmental educational programs which do not tend toward an established or preferred religion can itself effectively burden religious freedom in violation of the Free Exercise Clause. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) (denial of tax exemption for engaging in certain speech penalizes free speech). The government may not constitutionally condition the availability of a benefit on whether the potential recipient makes or refrains from making a particular religious choice. *McDaniel v. Paty*, 435 U.S. 618, 626, 633 (1978)

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[24] In *Wisconsin v. Yoder*, this Court stated "the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." 406 U.S. 205, 214 (1972). Stokes suggests that the Establishment Clause is the more important of the Religion Clauses for the protection of personal liberty. I Stokes, *supra* note 14, at 539.

(plurality); *Sherbert v. Verner*, 374 U.S. at 406. *Cf. Speiser v. Randall, supra.* When the Establishment Clause is made to burden religious liberty in that fashion, despite the absence of a concrete threat to authentic Establishment Clause values, the effect is an unconstitutional burden on Free Exercise. *McDaniel v. Paty, supra.*

Under the First Amendment, government may not unduly influence or inhibit parents' freedom to choose between private and public schools. *Abington Township v. Schempp*, 374 U.S., at 242. (Brennan, J., concurring). When there is no clear incompatibility between the Establishment Clause and an educational program available to all, invalidation under the Clause impermissibly burdens parents' freedom to choose a religious school for their children by denying them the general public benefit. *Meek v. Pittenger*, 421 U.S. at 386-387 (Burger, C.J., dissenting). A declaration of unconstitutionality in those circumstances can be a disability on church-affiliated education solely because of the religious nature of the school. Such a result is fundamentally inconsistent with the First Amendment.

Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities conducted by religious institutions which serve the public interest and which pose no actual threat to religious freedom.

II

THE THREE-PART TEST SUGGESTS A TWO-PART PURPOSE AND-EFFECT ANALYSIS. "EXCESSIVE ENTANGLEMENT" PROVIDES A MEANS TO DISCERN WHETHER A PARTICULAR ACTION HAS A PRIMARY EFFECT THAT ADVANCES OR INHIBITS RELIGION.

In its brief in *School District of Grand Rapids*, this *amicus* discussed (at 4, 16-25) the practical function of the three-part test as a two-part purpose-and-effect analysis. The general principle of the cases is that legislative action does not violate the Establishment Clause if its "primary effect" neither advances nor inhibits religion. *Committee for Public Education, Etc. v. Regan*, 444 U.S. 646, 653 (1980). The proper job of the "primary effect" component in Establishment Clauses analysis is to identify those governmental actions which pose a realistic threat of an establishment of religion, with a consequent burden on religious liberty. So too, as discussed above, for "excessive entanglement" to be a useful and principled analytical device there must be actual involvement by the government in religious affairs which tends actually (1) to establish or prefer a religion, or (2) otherwise to burden the free exercise of religion. These objectives themselves do not suggest a separate substantive criterion, but one which is subsumed under an "effects" analysis that entails more than one avenue of review.

Until 1970, this Court addressed Establishment Clause issues only in terms of purpose and effect. *E.g., Abington Township v. Schempp*, 374 U.S. at 222. In *Walz*, this Court identified entanglement as a means of assuring that "the end result—the *effect*—is not an excessive government entanglement with religion." 397 U.S. at 674 [emphasis added]. Later, when a plurality examined the meaning of entanglement in *Roemer v. Board of Public Works*, it did so by examining virtually the same factors as for "primary effect". 426 U.S. at 755-63. It was stated that the difference between "excessive entangle-

ment" and "primary effect" lies in the fact that the former is essentially a procedural issue and the latter a substantive one. *Id.* at 755. Because both appear, however, to be opposite sides of the same "effects" coin, in his concurring opinion Justice White questioned whether "excessive entanglement" was a criterion truly distinct from "primary effect". *Id.* at 769. For all the reasons put forth earlier, this *amicus* respectfully suggests that important analytical difficulties in Establishment Clause cases would be mitigated by an acceptance of Justice White's insight.

Under the Establishment Clause, "[n]eutrality is what is required." *Id.* at 747. Under the "primary effect" component, courts examine whether the principal result of state action either advances or inhibits religion. *Mueller v. Allen*, 103 S.Ct. at 3066, 3067. The government's efforts to support actions undertaken by churches that advance the public interest "may not lead it into such an intimate relationship with religious authority that it appears *either to be sponsoring or excessively interfering with that authority.*" *Roemer*, 426 U.S. at 747-48 [emphasis added]. The "sponsoring" element (advancement) raises the prospect of establishment in an authentic constitutional sense. *See* Argument I, B, *supra*. The "excessively interfering" aspect (inhibition) raises both establishment and free exercise concerns depending upon the nature of state action. *See* Arguments I, C and I, D *supra*. Although the underscored language quoted above from *Roemer* describes the "effect" of state action, the presence of "excessive entanglement" in the analysis is unmistakable.

Some discussions of the "excessive entanglement" criterion do not make clear its relationship to "primary effect", *i.e.* to the requirement that it is the threat of government's impermissible involvement in religion that stigmatizes "comprehensive, discriminating, and continuing state surveillance". *Lemon*, 403 U.S. at 619. Terms like "surveillance" lack constitutional significance unless, as in *Roemer*, the focus is upon conduct which clearly

trenches upon authentic Establishment Clause values. Further refinement of the substantive function of "excessive entanglement" in relation to "primary effect" would provide clearer guidance not only for the courts, but for those who must make legislative and administrative judgments.[25]

This *amicus* respectfully suggests that "excessive entanglement" should be understood precisely as another measure of whether state action has the primary effect of unconstitutionally advancing or inhibiting religion. "Excessive entanglement" and "primary effect" are alternative means of identifying the same problems, *i.e.* state action which tends to establish religion or burden religious liberty.

III

THE DECISION BELOW DOES NOT ACCORD WITH THE DECISIONS OF THIS COURT, ESPECIALLY THOSE WHICH STRESS FIDELITY TO CONSTITUTIONAL VALUES AS ILLUMINATED BY HISTORY. THE "EXCESSIVE ENTANGLEMENT" CRITERION WAS MISUNDERSTOOD AND MISAPPLIED.

The Court of Appeals invalidated the Title I program in New York City because it decided, erroneously, that the program excessively entangled church and state. *Felton v. Bell*, 739 F.2d 48 (1984), at S.G. App. 37a-38a and 53a.[26] The decision was a product of both an unduly

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[25] It has been noted that the seemingly anomolous results under the three-part test create a practical dilemma for those who must shape and administer public policy. *See* Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 J. Law & Educ. 101 (1974). What is a reviewable misunderstanding of constitutional principle in the judicial process can operate as an unwarranted restraint upon legislative and executive judgment, with protracted social effects.

[26] The reference "S.G. App." refers to the Appendix to the jurisdictional statement of the Solicitor General in No. 84-238, consolidated with Nos. 84-237 and 84-239. Appendix A is the decision below; Appendix C is the decision of a three judge court approving the program in 1980.

narrow view of this Court's rulings in *Meek v. Pittenger, supra, Wolman v. Walter, supra,* and two less germane cases,[27] and a failure to adjudicate the issues by a principled application of this Court's more recent decisions.[28] The court thought it was not "to make an independent interpretation of the constitutional text or to engage in creative distinctions but to do its best to follow what the [Supreme] Court has said." S.G. App. 15a. It thought its "task [was] to analyze the precedents and apply them as best we can: The responsibility for modifying or overruling them, if that is to be done, rests elsewhere." S.G. App. 43a, n.25. This *amicus* respectfully submits that due regard for the decisions of this Court would have led to a contrary result in the court below.

The Title I program is based on Congress' finding that there is "a close relationship between conditions of poverty and lack of educational development and poor academic performance." S. Rep. No. 146, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Admin. News 1446, 1450. By authorizing grants for remedial and supplementary education, Congress intended to help children who live in areas where there is a high concentration of poor and whose educational aptitude is below average for their age. 20 U.S.C. §§ 2722, 2732-34. Under Title I, school districts are required to provide publicly sponsored instruction on an equal basis to eligible children in both public and private schools. [1965] U.S. Code Cong., *supra,* at 1456, 1457. Congress contemplated that in some instances public school teachers would even provide special educational services (defined as "thera-

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[27] *Wheeler v. Barrera* did not reach the First amendment issue. 417 U.S. 402, 426 (1974). *Public Funds for Public Schools v. Marburger* is distinguishable on several grounds, including the fact that assistance was provided directly to non-public schools, not directly to the children. 358 F. Supp. 29 (D.N.J. 1973) (three judge court), *aff'd mem.,* 417 U.S. 961 (1974).

[28] *E.g., Lynch v. Donnelly, supra, Mueller v. Allen, supra,* and *Marsh v. Chambers, supra.*

peutic, *remedial*, or welfare services") outside of public school facilities. *Id.* [emphasis added]. Because particular needs vary across the country, Congress also provided that each local school district should design a program that would best remedy its specific problem. *Id.* at 1454.

New York City designed its program to meet its particular needs for remedial and supplementary instruction. S.G. App. 10a-11a, and n.5. After experimenting with off-premises and after-hours programs, the City determined that on-premises instruction was necessary to maximize educational benefits and minimize costs. *Id.* at 7a-8a. The effectiveness of this approach was borne out by a study, conducted in the 1977-78 school year, which demonstrated (among other things) that if the format were reversed and instruction were provided in public schools, over 40% of the program budget would be expended on transportation and other non-instructional items. S.G. App. 8a-9a; S.G. App. C 72a. In order to fund an off-premises program, it would have been necessary to cut 36% of the private school children enrolled in the program. *Id.* at 73a.

All Title I program teachers are employed by the New York City Board of Education, and they are under its exclusive control. *Id.* at 74a.[29] Each teacher reports to a field supervisor who, in turn, reports to a field coordinator. A supervisor or coordinator, or both, attempt at least one on-premises visit per month to evaluate a teacher's professional performance; to discuss any problems, complaints or concerns that might have been raised by the teacher, the City or the schools; and to monitor compliance with program guidelines. Supervision also occurs in monthly in-service sessions when private schools are closed for a holiday. S.G. App. 12a-13a. Supervisors

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[29] On-premises instruction in private schools occurs in classrooms specifically reserved by the private schools for the purpose. S.G. App. 13a. The classrooms are designated by signs as Title I classrooms and have been purged of all religious symbols. S.G. App. C 74a.

are not involved in the affairs of the private school. They do have contacts of a routine, administrative nature, including the review of Title I guidelines with private school administrators prior to the school year. *Id.* at 13a-14a. Title I "creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." U.S. Office of Education Program Guide No. 44 (1968), *quoted below*, S.G. App. 14a.

The court below annulled Congress' judgments and the City's carefully considered implementation of Title I, and dismantled a remedial educational program which the court conceded "has done so much good and little, if any, detectable harm." S.G. App. 52a. It did so because it perceived "excessive entanglement" in one minor aspect of the program whereby public school supervisors review the classroom work of Title I teachers. *Id.* at 35a-36a, 38a-39a. That supervision, among other things, is for the professional evaluation and development of the teacher. Because it also serves to assure that Title I courses are not used to advance religious views of the host school, the court said "this very surveillance constitutes excessive entanglement, even if it has succeeded in preventing the fostering of religion." *Id.* at 39a. It also suggested that even if the supervision were not "excessive entanglement," it was insufficient to assure with *certainty* that there would be no fostering of religion by Title I teachers. *Id.* Completing the conundrum, the court also held that to achieve that level of certainty would create "excessive entanglement." *Id.*

There is no evidence in this case of actual or probable state involvement in religious belief, practice, or governance, the effect of which would threaten establishment or preference of religion, or religious liberty. Chief Justice Burger's remarks in *Meek* seem particularly apt here:

> there is absolutely no support in this record or for that matter, in ordinary human experience for the concern some see with respect to the "dangers" lurking in extending common, non-sectarian tools of the educational process—especially remedial tools—to students in private schools.

421 U.S. at 385 (dissenting opinion). The court's finding of "excessive entanglement" on this record is sheer conjecture which lacks even a trace of identifiable evidentiary support.

The Title I program does not begin to approach the threshold of unconstitutional entanglement. It neither advances nor inhibits religion, nor does it threaten to do so in any way. The Constitution demands more than a groundless fear that publicly employed professionals may be "captured" by the "sectarian environment." S.G. App. 31a n.13, 36a n.15.[30] It requires proof of action which threatens authentic constitutional values, not an impossible contra-burden of proof that there will never be a problem. *Compare Legal Tender Cases*, 79 U.S. at 531 *and Hunt v. McNair*, *supra*, *with* S.G. App. 38a. The decision below is a product of "vague conjecture" (*Fletcher v. Peck*, 10 U.S. at 128) which fails to make the mandatory distinction between "real threat and mere shadow" (*Marsh v. Chambers*, 103 S.Ct. at 3337).

On this record, the invalidation of the Title I program is explained solely by the religious nature of the schools involved. That result cannot be reconciled with the

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[30] Although there is some discussion in both *Roemer*, 426 U.S. at 754, and *Wolman*, 433 U.S. at 247, about actions of public employees in a sectarian environment, such a conclusion is, first, difficult to justify on the record here and, second, impossible to reconcile with the constitutional requirement of clear incompatibility. The analysis that this *amicus* suggests is more in line with this Court's conclusion in *Committee for Public Education, Etc. v. Regan*, that it would not surmise the inevitability of bad faith leading to future excesive entanglement where the plan under review disclosed none. 444 U.S. 646, 660-61 (1980).

mutuality of objectives of the Establishment Clause and the Free Exercise Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1984

Yolanda Aguilar, *et al.*
Appellants

v.

Betty-Louise Felton, *et al.*
Appellees

and

Secretary, United States Department of Education
Appellant

v.

Betty-Louise Felton, *et al.*
Appellees

and

Chancellor of the Board of Education of the City of New York, *et al.*
Appellants

v.

Betty-Louise Felton, *et al.*
Appellees

On Appeal from the United States Court of Appeals for the Second Circuit

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INTEREST OF THE AMICUS

Citizens for Educational Freedom ("CEF") is an organization composed entirely of individual citizens, including parents of students in public and nonpublic schools, both secular and religious. CEF is not dedicated to any one religious belief, nor indeed to religion over nonreligion. It is a pluralistic organization dedicated to upholding the educational rights of parents and children. It is firmly committed to the belief that the education of children is primarily a matter of family and personal concern. Accordingly, CEF works through the legislative and judicial processes, as well as through public information programs, to support and advocate freedom of educational choice, diversity of education, and above all quality education for all children.

Consequently, *amicus* is concerned about the practical implications of the lower court's reasoning. CEF wishes to call this Court's attention to portions of the lower court's analysis which threaten a broad spectrum of legislative alternatives for assisting underprivileged children nationwide in a wide variety of nonpublic schools. It is not our intention to insist that all such legislative alternatives are necessarily constitutional. Our point is far more modest: Many of them may well be constitutional. Their possibilities should not be extinguished prematurely by the appellate court's less-than-subtle constitutional analysis.

Since CEF is concerned primarily with the broad implications of the lower court's reasoning, rather than just the particular program at issue, it does not believe its interest will be represented adequately by the parties.

SUMMARY OF ARGUMENT

This Court consistently has taught that Establishment Clause analysis admits of no *per se* rules. Rather, its criteria are guidelines for use in determining whether the challenged conduct tends to establish religion.

In spite of this Court's teaching, the court below erroneously has made a *per se* test of this Court's entanglement criterion. Furthermore, the court below has sought to implement its *per se* "test" with yet another *per se* rule: *no* public school teachers may *ever* teach nonpublic school children on nonpublic school premises, regardless of the circumstances.

These rigid *per se* rules do violence to the logic both of the entanglement criterion and the Establishment Clause itself. They also threaten to preempt a broad range of legislative options for serving disadvantaged nonpublic school children. A rigid *per se* rule should not be employed with respect to on-premises instruction of nonpublic school students by public school teachers. Rather each case should be decided on its facts.

The entanglement criterion is itself not a *per se* rule, and cannot be so applied. Deciding the question of entanglement involves judging the propriety of the church-state relationship in question. That propriety is itself the ultimate issue. Therefore, to attempt to decide establishment *solely* on the criterion of "entanglement" would be circular. The entanglement criterion is better viewed as simply providing a valuable perspective on the totality of the circumstances.

For purposes of Establishment Clause analysis, those governmental actions which potentially inhibit religion should be distinguished from those which potentially advance religion. Inhibition is by definition not establishment, but the opposite of establishment. If anything, inhibition is an abridgement of

free exercise. Consequently, taxpayer plaintiffs lack standing to raise the issue of government inhibition of religion in non-public schools, since taxpayer standing cannot be predicated upon the free exercise rights of third parties. The dilemma posed by appellees — i.e., that either the Title I teachers risk advancing religion or their supervisors inhibit it — is therefore illusory.

The record in this case, viewed either on the totality of the circumstances, or against the *Lemon* criteria, demonstrates that New York's Title I program has not established religion.

ARGUMENT

I. THIS COURT CONSISTENTLY HAS TAUGHT THAT ITS ESTABLISHMENT CLAUSE CRITERIA ARE NOT "TESTS," BUT GUIDELINES.

In framing its Establishment Clause doctrine, this Court has repeatedly emphasized that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly,* 104 S. Ct. 1355, 1361 (1984).[1] Thus, the Court has refused to invalidate mechanically every governmental action which benefits religion. *Id.* Instead,

> the Court has scrutinized challenged legislation or official conduct to determine *whether, in reality, it establishes a religion or religious faith, or tends to do so. Id.* (emphasis supplied; citation omitted).

To be sure, the Court has developed useful criteria to aid it in this determination. At the same time, however, the Court has emphasized that the utility of these criteria must be kept in perspective. The criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but *serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." Meek v. Pittenger,* 421 U.S. 349, 358-59 (1975) (emphasis supplied; citation omitted). This is true of the "principal evils" identified in *Walz.*[2] The Court has noted

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[1]Cf. *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970) ("rigidity could well defeat the basic purpose [of the Religion Clauses]").

[2]I.e., "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz, supra,* 397 U.S. at 668.

that their presence cannot be measured with any "constitutional caliper." *See Tilton v. Richardson,* 403 U.S. 672, 677 (1971).[3] It is likewise true of the three criteria collected in *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971). The Court has recently reminded us that it is unwilling "to be confined to any single test or criterion in this sensitive area. (citations omitted) In fact, on occasion, the Court has not even applied the *Lemon* 'test.' " *Lynch, supra,* 104 S. Ct. at 1362.

Accordingly, when the Court has chosen to use the *Lemon* criteria, it has called for circumspection. This is especially true in its use of the entanglement criterion:

> Judicial caveats against *entanglement* must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier *depending on all the circumstances of a particular relationship. Lemon, supra,* 403 U.S. at 614 (emphasis supplied).[4]

In sum, this Court has taught that the ultimate inquiry is "whether, in reality, [the challenged conduct] establishes a religion or religious faith or tends to do so." *Lynch, supra,* 104 S. Ct. at 1361. Comparing the conduct to the "principal evils" isolated in *Walz* and to the three criteria set forth in

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[3] "There is no single constitutional caliper that can be used to measure the precise degree to which any of these three factors are present or absent." *Tilton v. Richardson,* 403 U.S. 672, 677 (1971).

[4] *See also, Roemer v. Board of Public Works,* 426 U.S. 736, 766 (1976) (there is "no exact science in gauging the entanglement of Church and State"); *Hunt v. McNair,* 413 U.S. 734, 746 (1973) ("the degree of entanglement arising from inspection of facilities . . . varies in large measure with the extent to which religion permeates the institution"); *Tilton, supra,* 403 U.S. at 685 (various factors can "substantially diminish the extent and the potential danger of the entanglement").

Lemon may well be helpful in discerning the answer. But,

> [t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. *The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. Tilton, supra,* 403 U.S. at 678 (emphasis supplied).

II. THE ENTANGLEMENT CRITERION IS NOT A PER SE TEST, BUT RATHER MERELY PROVIDES A PERSPECTIVE ON THE TOTALITY OF THE CIRCUMSTANCES.

Contrary to this Court's teaching, the lower court read the *Lemon* criteria as three *per se* rules, or "tests." *See Felton v. Secretary, United States Department of Education,* 739 F.2d 48, 65 (2d Cir. 1984). The lower court further believed that the entanglement "test" included yet another *per se* rule, derived from *Meek. See Id.,* at 64. But subtle values are not well served by such dogmatic rigidity. It is no doubt true that "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Marsh v. Chambers,* 103 S. Ct. 3330, 3340 (1983) (Brennan, J., dissenting) (footnote omitted). But they would be mistaken.

Questions of educational policy provide a similar temptation. Rigid dogma is comforting. Yet, as with legislative prayer,

> [t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually *it requires a careful evaluation of the facts of the particular case. Wheeler v. Barrera,* 417 U.S. 402, 426 (1974) (citations omitted; emphasis supplied).

A. The Lower Court's Caricature of Meek Produced a Rigid and Impermissible Per Se Rule

Lynch teaches that in Establishment Clause analysis "no fixed, *per se* rule can be framed." *Lynch, supra,* at 1361. However, the Court below, ignoring *Lynch,*[5] found that there *was* a *per se* rule — i.e., that public school employees could *never* teach or counsel on nonpublic school premises regardless of the circumstances. The lower court writes,

> whatever the situation may be with respect to other forms of government aid, no part of the teaching or counselling function can be performed by public school employees [on nonpublic school premises], *whether under a good plan, a bad plan, or no plan at all. Felton, supra,* 739 F.2d at 67 (emphasis supplied).

This is a bald, *per se* rule. The facts of particular cases are deemed irrelevant. Indeed, in order to pronounce its *per se* rule, the Court of Appeals deliberately disregarded an extensive trial record which showed, *inter alia,* no evidence of a "complaint by a Title I teacher of interference by nonpublic school authorities or of any reports by supervisors that teachers have engaged in religious activity." *Felton, supra,* 739 F.2d at 53. The record notwithstanding, the court below concluded that if the supervisors had been effective, then there *must have been,* such "comprehensive, discriminating and continuing state surveillance"[6] as to be *per se* unconstitutional. *See Felton,*

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[5]In fact, the Court below deliberately "confined itself" to this Court's prior decisions on government aid to religious schools. See *Felton, supra,* 739 F.2d at 54. In so doing, it effectively ignored this Court's subsequent teaching on Establishment Clause analysis generally.

[6]*See Lemon, supra,* 403 U.S. at 619.

supra, 739 F.2d at 64.

The Court below thus has promulgated not only a *per se* rule, but a Catch-22. In nonpublic schools, if public school teachers are not violating *Lemon's* primary effect criterion, then their supervisors *must* be violating *Lemon's* entanglement criterion, regardless of the evidence. Under this *per se* rule, no conceivable program of on-premises instruction of nonpublic school students by public school employers could *ever* be constitutional. This is a dangerous misreading of *Meek*. What in *Meek* was a guideline for discerning potential establishment, has mutated into a *per se* rule which conclusively presumes establishment in every conceivable case.[7]

The lower court's *per se* rule further presumes that all nonpublic school settings are alike. Of course, all nonpublic school environments are not alike. There are, for instance, significant differences between Catholic and other nonpublic schools. Moreover, there are now significant differences between the environment that actually exists in many Catholic school systems, and that presupposed by the court below. The lower court adopted a 1972 characterization of Catholic schools.[8] In

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[7]This seems to have been an affirmative policy decision by the court below. "To relax *Meek's* ban on sending public school teachers and counsellors into religious schools . . ., on the basis of a demonstration that this has not advanced religion in New York City Schools, would let the genie out of the bottle." *Felton, supra*, 739 F.2d at 67. What genie? The purpose of this litigation is to determine whether *this program* has tended to establish religion. If it has not, it should not be struck down in order to further the Second Circuit's policy of discouraging similar programs not before the court.

[8]This list of characteristics was borrowed from *Meek*, and ultimately from *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439, 440-41 (S.D. N.Y. 1972). It is thus twelve years old.

fact, much has changed in the past twelve years.[9]

It is not the purpose of this brief to argue that it is constitutionally permissible to send public school teachers into all of the varied nonpublic school systems nationwide. Our point is far simpler: It *may* well be constitutionally permissible in a number of cases. The lower court's *per se* rule should not be allowed to preempt that possibility.

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[9]For instance, as the chart below demonstrates, the proportion of religious and lay teachers has been dramatically reversed nationally.

ITEM	UNIT	1960	1965	1970	1975	1977	1978	1979	1980	1981	1982
Elementary schools	Number	10,501	10,879	9,362	8,340	8,204	8,150	8,100	8,043	7,996	7,950
Pupils enrolled	1,000	4,373	4,492	3,355	2,525	2,421	2,365	2,293	2,269	2,266	2,225
Teachers, total	1,000	108	120	112	99	100	99	98	97	97	97
Religious	1,000	79	76	52	35	32	29	27	25	24	22
Lay	1,000	29	44	60	64	68	70	71	72	73	75
Secondary schools	Number	2,392	2,413	1,981	1,653	1,503	1,564	1,540	1,516	1,498	1,482
Pupils enrolled	1,000	880	1,082	1,008	890	867	853	846	837	828	801
Teachers, total	1,000	44	57	54	50	51	49	49	49	49	49
Religious	1,000	33	38	28	20	18	16	15	14	14	13
Lay	1,000	11	19	26	30	33	33	34	35	35	36

Source: National Catholic Educational Association, Washington, D.C., *A Statistical Report on Catholic Elementary and Secondary Schools for the Years 1967-68 to 1969-70,* and *U.S. Catholic Schools, 1973-74,* and National Catholic Educational Association/Ganley's, *Catholic Schools in America,* annual. *Published in, Statistical Abstract of the United States: 1984,* at 156 (U.S. Bureau of the Census, 104th ed. 1983).

B. Even The Entanglement Criterion Itself Is Not A Per Se Rule

Even apart from its misreading of *Meek*, the court below erroneously believed that the entanglement criterion was itself a *per se* rule. In fact, the court explicitly based its decision solely on "the entanglement test . . . without need to decide whether New York City's program fails *Lemon's* 'primary effect' test." *Felton, supra*, 739 F.2d at 65. Moreover, the court below even dismissed a number of arguments merely because "they bear on the question of 'primary effect,' not on the entanglement issue. . . ." *Id.*, at 70.

Once again, this disregards the constant teaching of this Court that Establishment Clause analysis admits of no *per se* rules. *See Lynch, supra*. Beyond that, however, *amicus* respectfully suggests that the very nature of the entanglement criterion prevents its use as a *per se* rule.

It is axiomatic that not every relationship between government and religion is an excessive entanglement.[10] Some relationship is inevitable.[11] Other relationships are required by the government's affirmative duty to accommodate religion.[12] Indeed, even some collaboration between government and

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[10]Cf. *Lynch, supra*, 104 S. Ct. at 1361. ("Rather than mechanically invalidating all governmental conduct . . . that . . . give[s] special recognition to religion . . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.")

[11]*See, Lemon v. Kurtzmann*, 403 U.S. 602, 614 (1971).

[12]Cf. *Lynch, supra*, 104 S. Ct. at 1359.

religiously-run institutions is salutary and in "the best of our traditions."[13]

Moreover, which relationships between government and religion are benign, and which are excessive entanglements, cannot reliably be determined merely from the extent of mutual contact. The military Chaplains' Corps involves a far greater number and complexity of contacts between church and state than did the zoning regulation in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). Yet the chaplaincy program is almost certainly constitutional.[14] The zoning regulation in *Larkin* was not. It "enmesh[ed] churches in the exercise of substantial governmental powers" and was therefore an establishment of religion. *Id.*, at 126.

Thus, whether a given relationship is excessively entangling depends not upon the *extent* of the relationship but upon the *propriety* of the relationship.[15] However, the propriety of the

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[13]*See Zorach v. Clausen*, 343 U.S. 306, 313-14 (1948) ("When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.") Cf. *Bradfield v. Roberts*, 175 U.S. 291 (1899) (government support of hospital run by Roman Catholic nuns is not an establishment of religion).

[14]In fact, it may be constitutionally required. Cf. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 296-297 (1963) (Brennan, J., concurring); *Id.*, at 309 (Stewart, J., dissenting); *Id.*, at 306 (Goldberg, J. concurring). *See generally*, Note, *The United States Military Chaplaincy Program: Another Seam In the Fabric of Our Society?*, 59 *Notre Dame L. Rev.* 181 (1983).

[15]Cf. *Lemon, supra*, 403 U.S. at 615 (question of entanglement turns upon "the character and purposes of the institutions that are benefitted; the nature of the aid that the State provides, and the relationship between the government and the religious authority").

relationship is itself the ultimate issue — i.e., whether the relationship is one which tends to establish religion.

Accordingly, any attempt to decide the question of establishment *solely* on an entanglement "test" would be quite circular. In practice, such determinations probably would degenerate into either *ad hoc* evaluations or, as in the case of the court below, further *per se* rules.

This is not to say that the entanglement criterion is simply a makeweight. It is not. Rather, it provides a valuable perspective on the totality of the circumstances. As the Court noted in *Lemon,* "involvement or entanglement between government and religion serves as a warning signal [in advance of] where the 'verge' of the precipice lies." *Lemon, supra,* 403 U.S. at 624-25.[16] A high degree of involvement may alert the court to the need for a heightened degree of scrutiny. It is a helpful clue in the Court's investigation. Thus the entanglement criterion provides a valuable perspective. It cannot, however, provide a litmus test.

Furthermore, while entanglement is a helpful warning signal that one is *approaching* the verge, it is not necessarily a sign that one is *at the verge.* There may yet be space.

True, brinksmanship is hardly a policy of choice. Nonetheless, it is often a practical necessity as legislatures seek to reach the important objective of providing an adequate education to disadvantaged children, while still respecting the parental right to educate. *See Pierce v. Society of Sisters,* 268 U.S. 510 (1925). In many cases the distance between a "warning signal" and "the verge" could well represent an important educational

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[16]Cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 797-98 (1973) (political divisiveness, while alone not enough to invalidate a statute, is nonetheless a "warning signal").

opportunity for a significant number of children. This is a possibility which should not be foreclosed to all legislatures merely because of speculation as to possible future difficulties.

> At this point in the 20th century we are quite far removed from the dangers that prompted the framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes — or even of deep political division along religious lines — is remote, and *when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Wolman v. Walter,* 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (emphasis supplied).

C. For Establishment Clause Purposes, Governmental Actions Which Potentially Inhibit Religion Should be Distinguished From Those Which Potentially Advance Religion

1. INHIBITION OF RELIGION INFRINGES, IF ANYTHING, THE FREE EXERCISE CLAUSE, NOT THE ESTABLISHMENT CLAUSE.

Inhibition is by definition not establishment; it is rather the opposite of establishment. Yet, paradoxically, the court below predicated its finding of establishment *upon* inhibition. The court proposed a dilemma: in order for the state to guard against the risk of its teachers inadvertently advancing religion in nonpublic schools, the state will have to undertake an overbearing surveillance of those schools. This surveillance is the entanglement which the court fears. It features "state inspectors prowling the halls of parochial schools and auditing classroom instruction." *Felton, supra,* 739 F.2d at 67 (citation omitted).

But such surveillance would hardly *establish* that school's religion. The very purpose of the surveillance would be to prevent religion from infecting state-supplied remedial instruction. Consequently, if that surveillance is affecting religion at all, it is inhibiting it. Such inhibiting surveillance may abridge the free exercise of religion[17] but it most certainly does *not establish* religion.

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[17]It also may *not* offend the Free Exercise Clause, depending on the amount of intrusion necessary. The record in this case shows that effective supervision required only monthly audits of public school classes by public school supervisors. *See, Felton, supra,* 739 F.2d at 53.

2. TAXPAYER PLAINTIFFS LACK STANDING TO RAISE NONPUBLIC SCHOOLS' POTENTIAL FREE EXERCISE CLAIMS.

The spectre of "state inspectors prowling the halls of parochial schools" suppressing religion is certainly ominous. Nevertheless, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened.[18]

Interested would-be plaintiffs cannot acquire standing by virtue of some "shared individuated right to a government" that does not prohibit the free exercise of religion. *See Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 482 (1982). Article III requires a real or threatened injury. *Id.*, at 472. In fact, in *McGowan v. Maryland,* 366 U.S. 420 (1961), the Court rejected an attempt by plaintiffs to raise the free exercise rights of third parties. In that case, the Court held that appellants lacked standing because they

> allege[d] only economic injury to themselves; *they [did] not allege any infringement of their own religious freedom* due to Sunday closing . . . . *McGowan, supra,* 366 U.S. at 429 (emphasis supplied).

So too here. Plaintiff's anxiety for the free exercise rights of nonpublic schools is misplaced. Individual nonpublic schools are free to refuse any or all government aid which they feel is intrusive. In any event, both nonpublic schools and their students are certainly capable of enforcing their own free exercise rights.

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[18]*Flast v. Cohen,* 392 U.S. 83, 104 n. 25 (1968), expressly declined to decide whether an assertion of the free exercise claims of third parties would be sufficient to confer taxpayer standing.

Accordingly, plaintiffs such as appellees should not be permitted to urge their dilemma: i.e., that in order to prevent public school teachers from advancing religion in nonpublic schools, their supervisors must inhibit it. Taxpayer plaintiffs, consistent with *Flast* and *Valley Forge*, should be permitted to complain only of possible establishment of religion. Consequently, they should be required to bear their burden of proof on that issue without the prop of a potential establishment-free exercise "dilemma."

III. NEW YORK CITY'S TITLE I PROGRAM HAS NOT TENDED TO ESTABLISH RELIGION.

Once the lower court's erroneous *per se* rules have been cleared away, the totality of the circumstances becomes obvious. The New York program has not established religion.

A. Appellees Have Failed To Prove That The Program Establishes Religion

At the outset of the evidentiary hearing in *National Coalition for Public Education & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D. N.Y. 1980), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (hereinafter, *PEARL*), the plaintiffs conceded that they "had *no evidence* that New York City's Title I program was unconstitutional. "*Id.*, at 1252 (emphasis added). Since the record was overwhelmingly contrary to their position, plaintiffs had no choice but to concede this point. Nor do Appellees have any other choice.

The lower court noted that in the sixteen year history of New York's Title I program, there is no record of any

"complaint by a Title I teacher of interference by nonpublic school authorities or of any reports by supervisors that teachers have engaged in religious activity." *Felton, supra,* 739 F.2d at 53. Indeed, the record affirmatively shows that "parochial school officials have no voice in the initial assignment of a Title I teacher." *PEARL, supra,* 489 F. Supp. at 1256. Title I teachers are carefully instructed that they are accountable only to Title I supervisors, not to nonpublic school officials. *Felton, supra,* 739 F.2d at 53. Title I teachers similarly are ordered not to become involved with a nonpublic school's religious activities, not to introduce any "religious matter" into their teaching, and not to discuss religious matters with nonpublic school teachers. *Id.* Title I teaching materials and equipment are

> labeled as property of the Board . . . are locked in storage and filing cabinets when not in use and are subject to an annual inventory. *Id.*

Finally, Title I classrooms are required to be "free of religious symbols and artifacts." *Id.*

"A federal court does not sit to render a decision on hypothetical facts . . . ." *Wheeler v. Barrera,* 417 U.S. 402, 427 (1974). Here, the record is unequivocal that New York's Title I program has not "in reality . . . establish[ed] a religion or religious faith, or tend[ed] to do so." *Lynch, supra,* 104 S. Ct. at 1361. In fact, it has not even come close.

Appellees simply have failed to prove their case.

B. The Lemon Criteria Illustrate That New York's Program Does Not Establish Religion

Viewed as guidelines, and not *per se* rules, the *Lemon* criteria demonstrate that the New York Program does not establish religion.

1. THE PROGRAM HAS A SECULAR PURPOSE.

The purpose of Title I is not in doubt. The statute itself gives its purpose as assisting

> local educational agencies to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children. 20 U.S.C. § 2701 (1982). *See also* 20 U.S.C. § 3801 (1982).

Accordingly, the *PEARL* court easily determined "that the purpose of the statute was to give aid to needy children, regardless of where they attend school." *PEARL, supra,* 489 F. Supp. at 1258. Cf. *Wheeler v. Barrera, supra,* 417 U.S. at 405-406 ("the legislative aim [of Title I] was to promote needed assistance to educationally deprived *children,* rather than to specific schools . . . .") (emphasis in original; footnotes omitted).

2. THE PROGRAM'S PRIMARY EFFECT IS TO BENEFIT CHILDREN.

Title I does not provide any assistance directly to nonpublic schools. Rather, Title I bestows its aid — remedial instruction — directly on disadvantaged children. Consequently, as the *PEARL* court noted, "Title I clearly adheres to the child benefit principle established in *Everson* and *Allen*." *PEARL, supra,* 489 F. Supp. at 1259.

Moreover, Title I provides its benefit to a broad class of disadvantaged children. In *Mueller v. Allen,* 103 S. Ct. 3062, 3068 (1983), this Court found it significant that the tax deduction at issue was "available for educational expenses incurred by all parents, including those whose children attend non-sectarian private schools or sectarian private schools."[19] In the present case nonpublic school students are a distinct minority among all Title I beneficiaries. In 1981-82, nonpublic school students were only 13.2% of the total number of benefitted students. *See Felton, supra,* 739 F.2d at 51.

It is probably true that some *incidental* benefit accrues to the nonpublic schools. But "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch, supra,* 104 S. Ct. at 1364, quoting *Nyquist, supra,* 413 U.S. at 771. Cf. *Hunt v. McNair, supra,* 413 U.S. at 743 (rejecting argument that aid to one aspect of an institution frees it to expend resources on religious ends). The direct beneficiaries are clearly the disadvantaged children, in both public and nonpublic schools, who now have the opportunity for remedial help.

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[19]Cf. *Widmar v. Vincent,* 454 U.S. 263, 274 (1981) ("the provision of benefits to so broad a spectrum of groups is an important index of secular effect")

3. THE PROGRAM IS NOT EXCESSIVELY ENTANGLING.

There is no evidence whatever that New York's Title I program has in any way occasioned "the active involvement of the sovereign in religious activity." *See Walz, supra,* 397 U.S. at 668. Monthly visits to public school classes by public school supervisors, for the express purpose of preventing the accidental advancement of religion, is simply not an establishment of religion. If it were an overbearing surveillance of the nonpublic schools themselves, then it might be an *inhibition* of religion. But government supervisors supervising only government-sponsored classes, with monthly visits, are hardly overbearing. In any event, potential inhibition of religion is not an *establishment* of religion.[20]

Thus the totality of the circumstances, viewed with or without the *Lemon* criteria, plainly demonstrates that New York City's Title I program has not tended to establish religion.

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[20]This Court also has been concerned about the potential for political entanglement. Since this case is not an instance of direct subsidy to nonpublic schools, political entanglement is not an issue. *See Lynch, supra,* 104 S. Ct. at 1364-65; *Mueller, supra,* 103 S. Ct. at 3071, n. 11.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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Nos. 84-237, 84-238, 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*, *Appellants*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION, *Appellant*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK, *Appellant*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

CONSOLIDATED CASES

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The Catholic League for Religious and Civil Rights respectfully moves this Court, pursuant to Rule 36.3 of its rules, for leave to file the accompanying brief *amicus curiae* in support of appellants Nos. 84-237, 84-238, 84-239. The consent of the parties has been sought. While written consent has been received from three of the four parties, written consent has not been received from the fourth party, the appellees.

The Catholic League for Religious and Civil Rights is a civil rights organization, national in membership, organized to combat all forms of religious prejudice and discrimination, and dedicated to the defense of the civil and religious rights of children to receive quality education, especially in communities where educational deprivation abounds.

Amicus believes that the decision and reasoning of the court of appeals creates a precedent for hostility and discrimination toward religion and religiously oriented entities. This decision impairs the religious freedom of such entities and, ultimately, of all citizens. *Amicus* believes that these religious freedom concerns may not be presented to the Court unless the brief *amicus curiae* is considered.

Therefore, *amicus* requests this Court to grant this motion and consider the accompanying brief in support of appellants.

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BRIEF FOR THE CATHOLIC LEAGUE FOR
RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE,
IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The interest of The Catholic League for Religious and Civil Rights as *amicus curiae* is set forth in the Motion for Leave to File a Brief Amicus Curiae.

SUMMARY OF ARGUMENT

Educational assistance programs such as Title I serve important societal interests. Establishment Clause challenges to these programs raise complex and sensitive concerns, and call for deliberate but flexible adjudication.

The decisions of this Court explicitly authorize such flexibility in the application of the *Lemon* three-part guidelines to Establishment Clause cases. Nevertheless, the court of appeals applied

an overly rigid analysis to invalidate the Title I program at issue. That court construed the *Lemon* guidelines so strictly against the challenged program as to allow no possibility of compliance with constitutional standards. Moreover, the court depicted religion and religious elements as dangerous contaminants and raised an irrebuttable presumption against the constitutionality of the challenged program, merely on the basis of the potentiality of religious influences. With the application of such harshness, the court of appeals violated the constitutional requirement of neutrality toward religion, and placed seriously discriminatory obstacles in the way of participation in government activities and programs by entities with religious orientations.

Under the properly flexible constitutional standards, the challenged Title I program passes constitutional muster. This Court, in sustaining the program at issue, should emphasize the inappropriateness of hostility to religion in constitutional review and the need for flexible accommodation in the analysis of such cases.

ARGUMENT

PROPERLY FLEXIBLE ESTABLISHMENT CLAUSE ANALYSIS SUSTAINS THE CONSTITUTIONAL VALIDITY OF THE TITLE I PROGRAM.

Appellees contend that the Title I educational assistance program now implemented in New York City violates the Establishment Clause of the First Amendment to the Constitution. Application of the appropriate standards of analysis, however, demonstrates the constitutional validity of the challenged program.

A. Consideration of an Establishment Clause Challenge to the Title I Program Requires Thoughtful and Flexible Analysis.

Challenges to governmental programs providing educational assistance in nonpublic schools raise complex and sensitive issues, *Mueller v. Allen*, 103 S. Ct. 3062, 3065 (1983); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646,

662 (1980), particularly in light of lingering tensions between Establishment and Free Exercise Clause jurisprudence, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *School District v. Schempp*, 374 U.S. 203, 222-23 (1963), and the important societal interests supporting effective educational programs. *Mueller*, 103 S. Ct. at 3066-67.

This Court has often remarked upon the key role of private educational institutions in promoting these societal interests in education, *Mueller*, 103 S. Ct. at 3070, and noted that "certainly private parochial schools have contributed importantly to this role," *Nyquist*, 413 U.S. at 795. Inner city private schools in particular play a uniquely valuable role in the promotion of racial integration, Coleman, *Public Schools, Private Schools and the Public Interest*, Am. Educ., Jan.-Feb. 1982, at 17; Greeley, Catholic High Schools and Minority Students, in *Private Schools and the Public Good—Policy Alternatives for the Eighties* 6 (E. Gaffney, Jr. ed. 1981), and in the provision of quality education to children from low-income families, Catholic League for Religious and Civil Rights: J. Cibulka, T. O'Brien & D. Zewe, *Inner City Private Elementary Schools: A Study* (1982).

Title I directs its assistance toward institutions "serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 2701 (1982). Assistance to inner city private schools thus forms an important and valuable segment of the Title I scheme. As the court below noted, "the program here under scrutiny has done much good and . . . [New York] City could reasonably have regarded it as the most effective way to carry out the purposes of [Title I]." *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, 49 (2d Cir. 1984).

Given the value of fostering education through the enactment of assistance schemes such as Title I, and given the vital role of the programs here at issue in the effectuation of Title I, careful and deliberate judicial scrutiny becomes most appropriate. While the merits of the program would not justify otherwise unconstitu-

tional activity, the First Amendment does not exist to hamper religious schools, *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), and courts must take care to avoid mechanically and inflexibly invalidating challenged programs, *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361, 1365 (1984).

The decisions of this Court in Establishment Clause cases explicitly authorize the necessary flexibility. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the Court summarized the standards for Establishment Clause scrutiny as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted). When it announced these Establishment Clause standards, the Court took care to warn against a strict or absolutist adherence to the three-part test: "The standards should rather be viewed as guidelines," since "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (plurality opinion). Since the *Lemon* and *Tilton* decisions, the Court has repeatedly emphasized the need for flexibility in the application of the three-part test, *e.g.*, *Mueller*, 103 S. Ct. at 3066; *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975); *Nyquist*, 413 U.S. at 773 n.31; *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (three parts of test "no more than helpful signposts"). Just last Term this Court emphatically reaffirmed that "a rigid, absolutist . . . approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch*, 104 S. Ct. at 1361.

B. The Court of Appeals Applied Overly Strict Standards of Analysis to the Title I Program.

Notwithstanding this clear and long-standing rule of flexibility in the disposition of Establishment Clause cases, the Court of Appeals for the Second Circuit applied a rigid analysis to the Title I scheme at issue here, and improperly invalidated the program. In its opinion the court constructed a test which rendered

compliance with the Establishment Clause logically impossible for appellant administrators of the Title I program. This impossible test arose in turn from an erroneously absolutist view of the place of religion in Establishment Clause analysis. Finally, this rigidity of analysis produced a level of scrutiny which discriminates against the participation of religiously oriented entities in governmental programs.

1. The court of appeals interpreted the applicable standards so strictly as to make compliance with the Constitution logically impossible.

In the view of the court of appeals, the Establishment Clause prohibits, not only the public funding of religious instruction, but even the mere theoretical "risk that public employees would consciously or unconsciously foster religion." 739 F.2d at 69. On the one hand, public personnel may not allow religious influences to affect their work, even unconsciously, *id.* at 64 n.15, since this would supposedly violate the "primary effect" part of the *Lemon* guidelines. On the other hand, the "active and extensive surveillance" necessary to prevent such religious influence from occurring would also violate the Constitution. According to the court of appeals, "this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion," *id.* at 66, and therefore such preventive measures would violate the third part—"excessive entanglement"—of the *Lemon* guidelines. Hence appellants find themselves in a Catch-22 situation in which they may neither conduct a routinely supervised Title I program, because that would entail an impermissible risk of fostering religion, nor conduct a program subjected to special supervision, because that would constitute excessive entanglement. The court below took the "Scylla and Charybdis of 'effect' and 'entanglement,' " *Nyquist*, 413 U.S. at 788, and moved them so close together that not even Odysseus could pass in safety.

2. The court of appeals treated religion as a harmful contaminant that must be absolutely nonexistent in government activities.

This impossible test which the court of appeals derived from the juxtaposition of the primary effect and excessive entanglement parts of the *Lemon* guidelines reflects a more fundamental error: the view of religion, in and of itself, as an evil against which the Establishment Clause protects. The opinion below speaks, for example, of "succumb[ing] to . . . religious influences," 739 F.2d at 65, and "stray[ing] into religious paths," *id.* Similarly, the court refers to the "danger that the religious atmosphere of the school will penetrate," *id.* at 66, and calls the fostering of religion a "harm," *id.* at 66, 72.

This view of religion as a "contaminant" which spoils otherwise constitutional programs both degrades religion and contradicts the spirit of the Religion Clauses. The Constitution commands a governmental attitude of neutrality, not hostility, toward religion. *Nyquist*, 413 U.S. at 788; *Schempp*, 374 U.S. at 225; *Zorach v. Clauson*, 343 U.S. 306, 315 (1952). In accordance with this mandate, the Court has rejected the notion that the mere presence of religious elements "would so 'taint' [an otherwise constitutional activity] as to render it violative of the Establishment Clause." *Lynch*, 104 S. Ct. at 1365. Such a ruling would represent a "stilted over-reaction contrary to our history and to our holdings." *Id.* The decisions of this Court do not require a choice between offending religion and offending the Constitution. On the contrary, this Court has explained that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any." *Id.* at 1359.

3. The court of appeals construed the relevant standards into a harshly discriminatory obstacle to participation by religiously oriented entities in governmental activities.

The court of appeals, further disregarding the constitutional mandate of neutrality toward religion, placed the burden on

appellants to prove that Title I did not and would not foster religion. 739 F.2d at 65. The Title I program thereby became presumptively unconstitutional. Furthermore, the court of appeals considered rebuttal of this presumption impossible no matter how much evidence appellants presented. *Id.* at 65 n.17. The presumption of unconstitutionality became conclusive.

The requirement that appellants prove the constant and complete absence of any and all religious influence on classroom activities, past, present, and future, even if it were not rendered logically impossible by the court's creation of an irrebuttable presumption, would still entail an unfair and discriminatory treatment of religious institutions. Were the same burden applied to governmental assistance to public school systems, or to any nonsectarian private schools, such assistance would also necessarily violate the Establishment Clause. No school could ever prove with absolute certainty that faculty or administrators who possessed strong religious beliefs did not on occasion, and would not ever in the future, whether consciously or unconsciously, communicate a religious value or act in response to religious convictions: "Focus exclusively on the religious component of *any* activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 104 S. Ct. at 1362 (emphasis added).

Indeed the very notion of enforcing a regime of complete ideological blandness would raise serious concerns regarding religious freedom rights under the First Amendment, and would vastly overstate the reach of the Establishment Clause. *See Lynch*, 104 S. Ct. at 1365-66; *Zorach*, 343 U.S. at 312-13. The Constitution prescribes that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion," *Schempp*, 374 U.S. at 225. Moreover, religious orientation cannot serve as a grounds for disqualifying a candidate for public office, *McDaniel v. Paty*, 435 U.S. 618 (1978) (delegate), or a recipient of public benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In combination, these rulings establish the principle that religious beliefs or orientation cannot serve to render individuals or institutions ineligible for participation in

government programs or operations: " 'No person can be punished for entertaining or professing religious beliefs . . . .' " *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961) (quoting *Everson*, 330 U.S. at 15-16). It follows that a per se rule against using the premises of a sectarian institution in the administration of government services has no basis in—and indeed works contrary to—constitutional interests embodied in the Religion Clauses.

C. Application of Flexible Standards of Analysis Upholds the Challenged Title I Program.

Proper application of the *Lemon* guidelines to the Title I program here challenged demonstrates the validity of that program under the Constitution.

In cases of governmental assistance to education, the initial "secular purpose" inquiry has created little conceptual difficulty, and typically presents no obstacle to the scrutinized programs. *Mueller*, 103 S. Ct. at 3066. The purpose inquiry essentially operates to disallow governmental activity clearly directed toward religious (or anti-religious, *Schempp*, 374 U.S. at 225) objectives. *E.g., Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments). A legislative scheme will survive the purpose inquiry unless "motivated wholly by religious considerations." *Lynch*, 104 S. Ct. at 1362. Educational assistance programs, such as the one here challenged, reflect the strong secular public interest in making quality education available for all children, and therefore easily survive the purpose inquiry.

Application of the second and third parts of the *Lemon* guidelines—the primary effect and excessive entanglement inquiries—has proved more problematic. *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (plurality opinion). The court of appeals in the instant case, as discussed above, misconstrued these guidelines into an unnecessarily restrictive test which distorts the Establishment Clause and threatens interests underlying the Free Exercise Clause of the First Amendment. A flexible, reasoned application of these guidelines, however, sustains the validity of the challenged programs.

The Constitution does not forbid religion—it forbids the governmental establishment of religion. But, as discussed above, the Constitution also prohibits hostility towards, or discrimination against, religion. Hence the primary effect inquiry in school assistance programs, whether the recipient schools are public, private nonsectarian, or private sectarian, does not ask whether any religious influences impinge upon the facilities, teachers, or students, but rather whether the government has introduced such influences, *Engel v. Vitale*, 370 U.S. 421 (1962) (official school prayer), or selected the given facilities, teachers, or students on the basis of or in order to promote such influences. Neutrality commands that the religious orientation of would-be participants in a government program be a criterion neither for exclusion nor inclusion in the program. *Everson*, 330 U.S. at 18. Likewise, the accident of religious orientation, or lack thereof, of the participants in such a program may not serve as a basis for invalidating that program, when based upon a neutrally constructed and administered law. *Mueller*, 103 S. Ct. at 3070.

Administrators of the Title I program at issue here have gone to great lengths to ensure the absence of religious matter, activities, or influences from program operations, *see* 739 F.2d at 53. Their zealousness in this regard totally dispels any notion of intent to foster religion—if anything, their efforts partake of the same unnecessary hypersensitivity to religion which pervades the opinion of the court of appeals. In no case can the Title I program be regarded as directed toward the promotion of religion. Therefore the program survives the effect inquiry of the *Lemon* guidelines.

Finally, no excessive entanglement arises from the challenged program. The court of appeals based its ruling that the program was unconstitutional on the hypothesis that excessive entanglement would be necessary to enforce the absolute absence of religion from the conduct of the challenged programs. 739 F.2d at 66. Since this rigid abhorrence of the slightest religious element does not accord with proper constitutional analysis, the conclusion that "active and extensive surveillance" would be necessary, *id.*, cannot stand. Without this logical necessity for excessive en-

tanglement, the routine supervision of public school personnel in these programs by their public school superiors poses no entanglement difficulties.

CONCLUSION

In reversing the judgment of the court of appeals, this Court should emphasize that the Constitution does not regard religion as a dangerous contaminant, the avoidance of which places programs of aid to private schools in impossible dilemmas. Title I has successfully "chart[ed] a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970). The program should be upheld.

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-237

Yolanda Aquilar et al., Appellants

v.

Betty-Louise Felton, et al., Appellees

No. 84-238

Secretary of Education, Appellant

v.

Betty-Louise Felton, et al., Appellees

No. 84-239

Chancellor, Bd. of Education of New York, Appellant

v.

Betty Louise Felton, et al, Appellees

Consolidated Cases

On appeal from the United States Court of Appeals for the Second Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Council for American Private Education, American Education Coalition, Association for Public Justice, Free Congress Research and Education Foundation, National Association for the Legal Support of Alternative Schools, National Coalition of Alternative Community Schools, and Parents Acting for Choice in Education in Support of the Appellants

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Council for American Private Education (CAPE) is a Washington D.C. based organization serving elementary and secondary private education. Fifteen national private school organizations comprise the membership of CAPE: the American Lutheran Church; the American Montessori Society; the Association of Evangelical Lutheran Churches; the Association of Military Colleges and Schools of the United States; Christian Schools International; Friends' Council on Education; the Lutheran Church, Missouri Synod; the National Association of Episcopal Schools; the National Association of Independent Schools; the National Association of Independent Schools; the National Association of Private Schools for Exceptional Children; the National Catholic Education Association; the National Society for Hebrew Day Schools; Seventh Day Adventist Board of Education, K-12; Solomon Schechter Day School Association; and the United States Catholic Conference. Together these organizations operate about 15,000 private schools enrolling approximately 4.2 million students, or over 80% of the nation's private school students. Member organizations are non-profit and subscribe to a policy of non-discrimination in admissions with regard to race, color, and national origin. This brief does not purport to reflect the views of all members of the Council but is based upon policies adopted by the Board of Directors of the Council.

The American Education Coalition is a national organization which emphasizes grass roots, local and familial control and involvement in education, as ways to improve the quality and effectiveness of education.

The Association for Public Justice is a Washington, D.C. based, non-profit, voluntary association of Christian citizens attempting to address issues of structural justice in many areas of public policy, including the education arena.

The Free Congress Research and Education Foundation is a Washington, D.C. based, non-profit association engaged in a variety of research and educational projects. It operates through two institutions, The Institute for Government and Politics and The Child and Family Protection Institute, which are concerned with issues of freedom of education.

The National Association for the Legal Support of Alternative Schools (NALSAS) is a national information and legal service center located in New Mexico. NALSAS is designed to research, coordinate and support legal actions involving non-public educational alternatives. NALSAS helps interested persons and organizations locate, evaluate, and/or create viable alternatives to traditional schooling approaches.

The National Coalition of Alternative Community Schools (NCACS) is a non-profit organization of people engaged in the challenge of securing the benefits of an egalitarian society for all people, regardless of race, religion, sex or age. The members of NCACS believe in utilizing educational processes to develop the full human potential of every individual. NCACS members are from diverse backgrounds and approach the task of creating an economically democratic society through many different means. For example, NCACS assists families who are involved in educating their children at home, and supports the creation of alternative schools that exemplify the concepts of democratic process and self government.

Parents Acting for Choice in Education (PACE) is a New York based, non-profit organization of people desiring to help parents understand and fulfill their responsibilities toward the education of their children, to promote increased public awareness about the proper role of government in education, and to strive to assure freedom of choice in education for all who desire it.

Amici include all the major national organizations involved in nonpublic education, as well as voluntary associations of taxpayers and parents concerned with the quality of education of all American children, whether they attend public or non-public schools. The Elementary and Secondary Education Act of 1965, as amended, challenged in this litigation is premised on the view that federal financial assistance in education, which supplements and does not supplant the primary role of the state and local governments in education, may within appropriate limits be made available to all children in

all schools. Hence amici organizations that are engaged in nonpublic education would be directly affected by the decision of this Court in this case.

Other amici are primarily concerned with parental rights in educational matters. These rights are acknowledged as part of the patrimony of humankind in the Universal Declaration of Human Rights adopted in 1948 by the United Nations General Assembly. Over two decades before the adoption of this declaration, this Court unanimously invalidated a provision of the Oregon State constitution that would have eliminated parental choice in the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The freedom of parents to choose the form of education they deem appropriate for their children is among the legitimate purposes of the legislation challenged in these cases.

Both groups of amici have vital interests in the outcome of this litigation and cannot reasonably expect their views to be presented fully to this Court by the parties. For the foregoing reasons, amici respectfully move this Court for leave to file this brief to urge this court to reassert its teaching that "the State has . . . a legitimate interest in facilitating education of the highest quality for all children . . . whatever school their parents have chosen for them " *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring and dissenting) and its teaching adumbrated in *Pierce* and developed in subsequent decisions concerning familial privacy that parents retain an important interest in exercising educational choice.

Amici have sought permission of the parties to participate and have received consent by telephone. The expedited briefing schedule necessitates the filing of this motion.

BRIEF AMICUS CURIAE

INTEREST OF AMICI

The interests of the amici in the instant litigation are set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

I. THE INCLUSION OF DISADVANTAGED STUDENTS ATTENDING NONPUBLIC SCHOOLS WITHIN A BROADLY AVAILABLE FEDERAL PROGRAM IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE

A. THE CONGRESSIONAL STATEMENT OF PURPOSE - PROMOTING THE VALUE OF EDUCATIONAL PLURALISM - CONSTITUTES A VALID SECULAR PURPOSE

B. THE NEW YORK PLAN OF IMPLEMENTING THE FEDERAL STATUTE (TITLE I) DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING OR INHIBITING RELIGION

1. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS TO DISADVANTAGED STUDENTS RATHER THAN TO RELIGIOUS INSTITUTIONS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION

2. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS ON A NONDISCRIMINATORY BASIS TO A BROAD CLASS OF DISADVANTAGED STUDENTS ATTENDING PUBLIC AND NON-

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ARGUMENT

I. THE INCLUSION OF DISADVANTAGED STUDENTS ATTENDING NONPUBLIC SCHOOLS WITHIN A FEDERAL PROGRAM BROADLY AVAILABLE TO STUDENTS IN PUBLIC AND NONPUBLIC SCHOOLS IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE

A. THE CONGRESSIONAL STATEMENT OF PURPOSE - PROMOTING THE VALUE OF EDUCATIONAL PLURALISM - CONSTITUTES A VALID SECULAR PURPOSE

In his opinion for this Court in *Committee for Public Education and Religious Liberty v. Regan*, 446 U.S. 646 (1980), Justice White wrote:

> Establishment Clause cases are not easy, they stir deep feelings, and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. *id.* at 662.

Although Establishment Clause cases are not easy, this Court has never adopted the view that this Clause supports an attitude of hostility towards religious institutions that might derive some indirect benefit from a program providing educational benefits to disadvantaged children attending public and non-public schools, such as the legislation challenged in this litigation.

The basic purpose of the Establishment Clause is, of course, "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). As Chief Justice Burger stated in *Walz*, short of expressly proscribed governmental acts that would either establish religion or interfere with religion, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *id.*

In the legislation challenged in these consolidated cases Congress did not provide for any direct governmental subsidy of any particular religious group or of religious groups in general. Nor, given our scheme of federalism, did the Congress make bold to supplant the rightful place of primacy enjoyed by state and local governments in providing educational benefits to the nation's children. On the contrary, the Congress expressly stated that the program it undertook in Title I of the Elementary and Secondary Education Act of 1965,[1] 20 U.S.C. § 2701 *et. seq.* was designed "to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children." 20 U.S.C. § 3801. In creating the U.S. Department of Education, the Congress reiterated this theme of federalism, stating: "in our federal system, the primary responsibility for education is reserved respectively to the States and the local school systems." 20 U.S.C. § 3401 (4).[2]

These policies reflect a reasonable and reasoned decision of the Congress nearly two decades ago to recognize that a healthy pluralism and diversity in education is not only desirable but also necessary. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925),[3] Justice McReynolds wrote for a unanimous Court:

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[1]Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 *et seq.*, which incorporates by reference many sections of former Title I and includes virtually identical provisions governing the participation of nonpublic school students. The unreported decision of the District Court, and the reported decision of the Court of Appeals, 739 F.2d 48 (2d Cir. 1984), uniformly refer to Title I and the regulations issued thereunder, see 45 C.F.R. Part 116a (1979), and for clarity's sake amici shall do likewise.

[2]The Education Amendents of 1974 strengthened the provisions of Title I requiring comparable and equitable services for private school children by adding enforcement procedures that could be implemented against states failing to meet their statutory obligation to provide those comparable and equitable services. Pub. L. 93-380, 88 Stat. 484, 497-99 (1974). The Education Amendments of 1978 added the requirement to 20 U.S.C. § 2740 that the expenditures for educational services for educationally deprived children in private schools "shall be equal . . . to expenditures for children enrolled in the public schools of the local educational agency." P.L. 95-561, 92 Stat. 2143, 2171-72 (1978).

[3]See S. Arons, *Compelling Belife: The Culture of American Schooling* (1982), Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 *Harv. Ed.*

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations. *Id.* at 535.

See also *Lemon v. Kurtzman*, 403 U.S. 602, 630 (1971) (Douglas, J. concurring). In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) this Court expressly acknowledged "the validity of the State's interest in promoting pluralism and diversity among its public and nonpublic schools." *Id.* at 773. In *Wolman v. Walter*, 443 U.S. 229 (1973), Justice Powell observed that "the State has a legitimate interest in facilitating education of the highest quality for *all children* within its boundaries, *whatever school* their parents have chosen for them." *Id.* at 262 (Powell, J. concurring and dissenting) (Emphasis added).

Since the fostering of pluralism of educational choice is a valid secular purpose in the legislation of several states,[4] which have undertaken the task of providing a free public education for those who choose it or whose options are not otherwise foreclosed, it must

Rev. 76 (1976); D. Kommers and M. Wahoske, eds., *Education and Freedom: Pierce v. Society of Sisters Reexamined* (1978); and R. McCarthy, J. Skillen, and W. Harper, *Disestablishment A Second Time: Genuine Pluralism for American Schools* (1982).

[4]All relevant precedents of this Court have found a valid secular purpose in state programs of financial aid to nonpublic schools or to students attending them or to their parents, irrespective of whether these programs were sustained or invalidated on other grounds. See, e.g., *Bd. of Education v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Commission*, 397 U.S. 664, 672-674 (1970); *Lemon v. Kurtzman* 403 U.S. 602, 613 (1971); *Committee for Pub. Educ. and Relig. Lib. v. Nyquist*, 413 U.S. 756, 773 (1973); *Sloan v. Lemon*, 413 U.S. 825, 827-828 (1973); *Hunt v. McNair*, 413 U.S. 734, 741-742 (1973); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 754 (1976); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Committee for Pub. Educ. and Relig. Lib. v. Regan*, 444 U.S. 646, 653-654 (1980); see also *Widmar v. Vincent*, 454 U.S. 263, 271-272 (1981); *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 1687 (1982); *Larkin v. Grendel's Den*, 103 S. Ct. 505, 508 (1982).

[5]This Court so ruled with respect to federal legislation in *Tilton v. Richardson*, 403 U.S. 672, 678-679 (1971).

likewise be a valid secular purpose for the Congress,[5] which has not supplanted the states but only supplemented the educational endeavors of the states.[6] It should not be thought that the Establishment Clause can or should be used as a bludgeon to strike down any and all forms of support, however indirect, for nonpublic education. The Religion Clauses were adopted long before states had public school systems and cannot fairly be viewed as protecting an absolute monopoly of governmental resources for the schools that the government maintains and operates.

It is, moreover, regretable that the twin values of governmental neutrality in religious matters and parental freedom in the education of their children should be viewed as competing or in conflict with one another. At a recent conference in Washington, D.C., John J. Gilligan, a prominent public policy maker who has served in the legislative and executive branches of government at the local, state, and federal levels, expressed concern over the fruitless character of pitting these values against one another. Referring to his experience as Governor of Ohio, Gilligan noted:

> My own experiences as Governor of Ohio in the early Seventies, in a state which had its fair share of all of the problems afflicting education today, convinced me that there were two major impediments to dealing successfully with our educational problems. First, there was the propensity of those in government to think in terms of an educational institution which had passed into oblivion 15 or 20 years earlier. In other words,

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[6]In *Nyquist*, the Chief Justice argued: "It is no more than simple equity to grant partial relief to parents who support the public schools they do not use." 413 U.S. 756, 803 (Burger, C.J., dissenting). The majority in *Nyquist* did not accept this suggestion because "[t]he grants to parents of private school children are given in addition to the right that they have to send their children to public school 'totally at state expense.' " *Id.* at 782, n. 38. This reply to the equity argument is, of course, unavailing in the instant case because Congress has not undertaken to provide a federal entitlement to have children educated in free federal schools. For this very reason, Members of Congress might consistently with their oath of office to uphold the U.S. Constitution, and with their plenary power to enforce the Equal Protection Clause by appropriate legislation, Am. XIV, §5, legitimately decide to include disadvantaged children attending church-related schools within a general program designed to meet the special educational needs of all disadvantaged children in the nation.

they tended to think in terms that no longer applied to the current situation, and to deal with the problems to an earlier period rather than those of the present or the future.

Second, and even more threatening to any hope of finding a solution to the problems of the Eighties and Nineties in the field of education, was the evident instinct of educators and educational administrators - perhaps understandable in the light of what appeared to be dwindling moral and financial support for education - to divide the educational universe into separate and rival domains and duchies: public schools against private; academic programs versus vocational training; suburbs against central cities; underprivileged children versus the affluent; minorities against majority. That tendency seemed to me then, and seems to me now, to accomplish nothing in terms of advancing the interests of one sector of education in relation to the other, but rather to provide ammunition to those who were seeking any and every rationale for curtailing support to education as a whole. Participants in this kind of fratricidal strife were - and are - thus inflicting serious damage on the very enterprise they profess to defend and serve. "Foreword" in E. Gaffney, ed., *Private Schools and the Public Good: Policy Alternatives for the Eighties* viii (1981).

B. THE NEW YORK PLAN OF IMPLEMENTING THE FEDERAL STATUTE DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING OR INHIBITING RELIGION

The most critical test under the Establishment Clause for scrutinizing the federal statute challenged here is the primary effect test, according to which legislation may not have the result of either advancing or inhibiting religion. See, e.g. *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222 (1963); *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669-670 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

In *Tilton v. Richardson* 403 U.S. 672 (1971), decided on the same day as *Lemon*, the Chief Justice explained the primary effect test as follows:

> The crucial question is not whether some benefit accrues to a religious instruction as a consequence of the legislative program, but whether its *principal* or primary affect advances religion. *Id.* at 679 (emphasis supplied).

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) Justice Powell clarified the primary effect test by noting that it is not fulfilled by a finding that a statute has "only a *remote* and *incidental* effect advantageous to religious institutions." *Id.* at 784, n. 89 (emphasis supplied). The most recent formulation of the test requires that legislation not have the "*direct* and *immediate* effect of advancing religion." *Larkin v. Grendel's Den, Inc.* 103 S.Ct. 505, 508 (1982).

By its terms, the primary effect text raises an empirical question. Hence judicial reliance on this test is more persuasive if trial courts produce adequate records disclosing the actual, factual results or effects of contested legislation. See, e.g., D. Moynihan, *Counting Our Blessings* 162-190 (1980), and Wilson, "The Facts Matter: The Case for Accurate Records in Constitutional Adjudication" in E. Gaffney, ed. *Private Schools and the Public Good* 189-191 (1981). Some of the leading cases of this Court relevant to the instant case, such as *Lemon, supra; Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977), were not decided on full factual records of the actual operation of the statutes invalidated in those cases, but on meager records leading ineluctably to speculation about potential evil rather than to sound judgment about actual harm. This fact led Justice Marshall to warn in *Wolman, supra*, against needless worry about "imaginable but totally implausible evils" 433 U.S. at 260, n. 6. (Marshall, J., concurring and dissenting). As Justice Frankfurter said in another context:

> One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract . . . . The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. *New York v. United States*, 326 U.S. 572, 575, 583 (1946).

Unlike *Lemon, Meek, and Wolman*, the instant cases come before this Court upon a full record that provides a better vehicle for fashioning its teaching on primary effect in a greater clarity for the federal and state tribunals, legislators and administrators who look to the decisions of this Court for guidance.[7]

In *Nyquist, supra*, Justice Powell suggested three manageable criteria for determining the primary effect of legislation involving financial assistance to church-related schools or to students attending them. These criteria suggest that a program is less probable of having the impermissible effect of *advancing* religion (l) if the educational benefits are disbursed to individuals students or to their parents rather than directly to a religious body or to a church-related school, (2) if the educational benefits are available to a broad class of beneficiaries, and (3) if there are adequate safeguards built into the program to protect against the use of funds for religious instruction. The third criterion also guards against the possibility that the effect of a program might be to *inhibit* religion if it were administered in such a way as to constitute excessive entanglement of the government in religious affairs. Finally, this court has suggested that legislation might be impermissible if it entails "risk of significant religious or denominational control over our democratic processes, or even of deep political division along political lines" *Wolman, supra*, 433U.S. at 263 (Powell, J., concurring and dissenting).

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[7]Despite this Court's abandonment of an absolutist approach to Establishment Clause cases, see e.g., *Committee for Public Education and Religious Liberty v. Regan*, 442 U.S. 646, 662 (1980) and despite this Court's admonition against adoption of an inflexible *per se* rule in this area, see, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984); *Walz, supra*, 397 U.S. 664, 669 (1970), the Court of Appeals in the instant case virtually ignored the extensive and uncontested record of the operation of the Title I program in New York City since its inception in 1966; see *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248 (S.D.N.Y.) app. dismissed, 449 U.S. 808 (1980). Focusing instead on potential evils that have not materialized in the 18 years of this program's operation, the Court of Appeals misread *Meek, supra*, to be a "fixed, *per se* rule" requiring the invalidation of this program. This incorrect result suggests the wisdom of Chief Justice Marshall's admonition in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1809), that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be construed as void." *Id.* at 128. See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 408-416 (1819).

1. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS TO DISADVANTAGED STUDENTS RATHER THAN TO RELIGIOUS INSTITUTIONS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION

The distinction between benefits to individuals and benefits to institutions is of overriding constitutional significance; it reflects a basic distinction between what the "effect" test is concerned with and what it is not. That test is an "institutional" test. As Justice Powell explained in *Nyquist*, it is designed to scrutinize "effect[s] advantageous to religious institutions," not individuals. *Nyquist*, 413 U.S. at 783 n. 39 (emphasis added). See also *Wolman*, 433 U.S. at 263 (Powell, J.) (separate opinion). Time and again this Court has reaffirmed the teaching of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), that state aid to individuals stands on an entirely different constitutional footing from aid to institutions.[8] In *Lemon v. Kurtzman*, Chief Justice Burger aptly summarized this principle when he stated:

> The . . . statute [at issue in Lemon] . . . has the . . . defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. 403 U.S. at 621 (emphasis added).

This is not to say that disbursement to individuals necessarily satisfies the "effect" standard.[9] As Justice Powell explained in *Nyquist*, the fact that aid is disbursed to individuals rather than institutions

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[8]For example, in *Allen* Justice White wrote that "no funds or books are furnished to parochial schools and the financial benefit is to *parents* and *children*, not to schools." 392 U.S. at 243-44 (emphasis added). Similarly, in *Everson* Justice Black stated that the "State contributes no money to the schools. It does not support them. Its legislation . . . does no more than provide a general program to help *parents* get their *children*, regardless of their religion, safely and expeditiously to and from . . . schools." *Everson*, 330 U.S. at 17-18 (emphasis added).

[9]This is also not to say that aid directly to institutions necessarily violates the "effect" standard. See, e.g., *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

does not create an irrebuttable presumption of validity but is one significant factor to be considered: *Nyquist*, 413 U.S. at 781.[10] In light of cases such as *Everson* and *Allen*, it is a highly significant factor. Justice Powell himself pointed this out in his separate opinion in *Wolman*, when he noted that individualized instructional materials, incapable of diversion to religious uses, can be provided by the State "so long as the materials are lent to the *individual students or their parents* and not to the sectarian institutions." *Wolman*, 433 U.S. at 263 (emphasis added). In making these comments, Justice Powell was explicitly distinguishing *Meek v. Pittenger*, 421 U.S. 349 (1975), where the Court held that similar loans of instructional materials directly to schools were impermissible.[11]

Most recently in *Mueller v. Allen*, 103 S.Ct. 3062 (1983) this Court reaffirmed its teaching that the distinction between benefits to students or their parents and benefits to religious institutions is a "material one in Establishment clause analysis." *Id.* at 3069. Justice Rehn-

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[10] At least three Justices—Chief Justice Burger, Justice White (the author of *Allen*), and Justice Rehnquist—would seem to rule that disbursement to individuals rather than institutions renders a program per se constitutional. According to the Chief Justice: "[T]he Establishment Clause does not forbid . . . a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship . . . [A]id to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Nyquist*, 413 U.S. at 799-801 (Burger, C. J., dissenting). Similarly, Justice Rehnquist has stated that "the impact, if any, on religious education . . . is significantly diminished by the fact that the benefits go to the parents rather than to the institutions." *Nyquist*, 413 U.S. at 812-13 (Rehnquist, J., dissenting).

[11] Justice Powell's separate opinion in *Wolman* also points out a second significant aspect of the "child benefit" doctrine of *Allen* and *Everson* - where aid is disbursed to children rather than schools, there is no concern with whether the schools are "pervasively sectarian." In *Meek* the Court employed this concept of "pervasive sectarianism" to invalidate loans made directly to church-related schools, on the ground that "[s]ubstantial aid to the educational function of . . . [pervasively sectarian] schools . . . necessarily results in aid to the . . . religious mission" as well, since the secular and religious functions are "inextricably intertwined." *Meek*, 421 U.S. at 366. As Justice Powell's *Wolman* opinion makes clear, loans to students, not schools, are permissible under *Allen*, even though the schools attended by the students are "pervasively sectarian." See also *Americans United for Separation of Church and State v. Blanton*, 433 F.Supp. 97 (M.D. Tenn) *aff'd mem.*, 434 U.S. 803 (1977).

quist conceded that "financial assistance provided to parents *ultimately* has an economic effect comparable to that of aid given directly to the schools attended by their children," but noted that, under the Minnesota income tax deduction program sustained in *Mueller*, "public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.* Indeed, Justice Rehnquist observed that, with the sole exception of *Nyquist, supra*, distinguished in *Mueller* on grounds of breadth of beneficiary class, 103 S.Ct. at 3068-3069, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." *Id.* at 3069. Since no such direct aid to church-related schools is allowed under Title I, which distributes educational benefits directly to educationally disadvantaged students from low-income families, this program passes constitutional muster under the primary effect test.

2. DISBURSEMENT OF TITLE I EDUCATIONAL BENEFITS ON A NONDISCRIMINATORY BASIS TO A BROAD CLASS OF DISADVANTAGED STUDENTS ATTENDING PUBLIC AND NONPUBLIC SCHOOLS FAVORS A FINDING THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION.

The judgment in *Walz v. Tax Commission supra*, sustaining property tax exemption for religious houses of worship, rested in part on the fact that the exemptions challenged in that case were available to a broad class of beneficiaries, to "*all* houses of religious worship within *a broad class* of property owned by nonprofit, quasi-public corporations . . ." *Walz*, 397 U.S. at 673 (emphasis added). *Everson, supra*, and *Allen supra*, are to the same effect; in each case the educational benefits were available not merely to nonpublic school children, but to *all* school children, regardless of whether they attended a public or a nonpublic school. By contrast, the New York legislation challenged in *Nyquist* was narrowly drawn, affording benefits *only* to nonpublic school children and their parents. Justice Powell stressed this very fact when he distinguished *Nyquist* from *Everson* and *Allen*. As Justice Powell explained:

> *Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included

all school children, those in public as well as those in private schools. 413 U.S. at 783 n. 38 (emphasis in original).[12]

In *Widmar, supra,* Justice Powell likewise noted:

> [T]he benefit is available to a *broad class* of nonreligious as well as . . . religious . . . groups. . . . The provision of benefits to so broad a spectrum of groups is an important index of secular effect. 454 U.S. 263, 274 (1981) (emphasis supplied).[13]

Most recently, in *Mueller, supra,* this Court reaffirmed its teaching concerning the importance of the breadth of the beneficiary class as

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[12]*See L. Tribe, American Constitutional Law* 845 (1978) (emphasis added): "the *narrowness* of the benefited class was *a key factor* in . . . *Nyquist.*"

[13]Professor Tribe has suggested that this criterion relating to the breadth of the beneficiary class is concerned primarily with perceived "symbolic identification" or governmental programs with religious interests:

> [W]hat turns on the breadth of the benefited class is not dollars—the amount of aid plainly does not depend on how many others also receive it—*but symbols; the broader the class benefited, the less likely it is that the program will be perceived as aid to religion. Id.* at 845.

Narrowly drawn legislation clearly embodies a danger of symbolic identification, since it is far more likely that such a program will be seen as conferring a special benefit on religious interests. The fact that some persons receive a benefit, whereas other similarly situated persons are excluded, tends naturally to foster a perception by those excluded of a special affiliation between the State and the benefited class. For example, if eligibility for education benefits is limited to students at nonpublic schools, as in *Nyquist,* the public's common knowledge that most such schools are sectarian, coupled with the fact that most of the children in the total student population, those in public schools, are statutorily excluded from eligibility, likely will lead to a perception that the benefits flow primarily to sectarian schoolchildren. In such a case it is clearly appropriate to look behind the statute and, through a statistical breadth analysis, ascertain whether the danger of symbolic identification is a real and probable danger.

Broadly drawn legislation presents an entirely different situation. Where all similarly situated persons (such as all parents of all schoolchildren) are eligible for benefits, as in *Everson, Allen,* and *Walz,* there is little likelihood that the program will be perceived as aid to a special group, since there is no special group which receives an eligibility preference. In such a case there is little or no danger of symbolic identification and consequently nothing to trigger the need for a statistical examination of the class of beneficiaries. The important point is that the statute treats all persons equally, such that no one group can be seen as being favored over others. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-126 (1982) and *Larson v. Valente,* 456 U.S. 228, 224-246 (1982).

an indicator that legislation does not have the impermissible effect of advancing religion. The majority in *Mueller* expressly distinguished *Nyquist* on this point, noting:

> Unlike the assistance at issue in *Nyquist*, [the Minnesota tax deduction program] permits *all* parents—whether their children attend public schools or private—to deduct their children's educational expenses. As *Widmar* and our other decisions indicate, a program like [the Minnesota scheme] that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause. *Mueller*, 103 S.Ct. at 3068-3069.

Since the class benefited by Title I is broad by both congressional design, *see* 20 U.S.C. §§ 2740 and 3806(a), and by actual operation under the facts of this case, providing benefits to educationally disadvantaged students attending both public and nonpublic schools, the congressional legislation challenged here does not have the impermissible effect of advancing religion.

3. ADMINISTRATION OF THE TITLE I EDUCATIONAL BENEFITS PROVIDE ADEQUATE SAFEGUARDS THAT THE CONGRESSIONAL LEGISLATION DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF ADVANCING RELIGION.

The legislative history of Title I clarifies that "public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services). . . ." S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965); *see also* H.R. Rep. 95-1137, 95th Cong., 2d Sess. 6 (1978). In addition to these clear congressional mandates restricting Title I funds to nonreligious instruction, the executive branch has issued authoritative regulations governing the use of Title I funds. These regulations require the public educational agency to "exercise administrative direction and control over funds and property" used in Title I programs. 34 C.F.R. 200.70(c). In addition, these regulations specifically authorize the local public educational agency to provide Title I services to children attending nonpublic schools only through public school employees

or through contractors "independent of the private school and of any religious organizations." *Id.* 200.70(d)(1).

On the record in this case, the New York Board of Education has complied fully with the congressional intent and the federal regulations. Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. The nonpublic schools are not reimbursed for the classroom space. Both the nonpublic schools and the Title I teachers are informed that the Title I teachers have sole responsibility for selecting students for the program. The materials used in the classes have no religious content. The Board retains title to the materials and equipment used in Title I classes; the teachers are instructed to keep the materials locked in storage cabinets when they are not in use; and the materials are subject to an annual inventory. App. in No. 84-238, 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. The field supervisors answer to the Board's program coordinators, who also make occasional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matter into a class. *Id.* 13a-14a, 87a.

On this record, then, there is no empirical evidence supporting the conjecture that Title I, either by design or actual operation in New York over a period of 18 years, has the impermissible effect of advancing religion.

4. ADMINISTRATION OF THE TITLE I EDUCATIONAL BENEFITS DOES NOT HAVE THE "DIRECT AND IMMEDIATE" OR "PRINCIPAL" EFFECT OF INHIBITING RELIGION BY ENTANGLING THE GOVERNMENT EXCESSIVELY IN RELIGIOUS AFFAIRS.

The value of non-entanglement of the government in religious affairs has been articulated by this Court in four distinct contexts:

(1) cases involving church property disputes, (2) cases involving governmental regulation of religious bodies or allowing a religious body to exercise a measure of governmental authority, (3) cases involving claims of religious conscience protected under the Free Exercise Clause, and (4) cases involving public financial assistance to church-related schools or to students attending them or to parents of these students.

The central, unifying theme of these cases is that the government is permitted only a severely limited role in regulating the affairs of religious bodies, lest the autonomy and integrity of these bodies be needlessly diminished.

This theme appears to be a restatement of the similar concern, articulated under the rubric of the primary effect test, that the government may not *inhibit* religion. Thus, in the context of the intra-faith church property disputes, the judicial branch of government may not involve itself in theological or canonical interpretation, but is limited to the application of neutral principles of secular law.[14] In cases involving governmental regulation of religious bodies, the judicial branch will often construe a statute or administrative regulation in such a way as to avoid a head-on collision between a governmental agency and a religious body.[15] In the context of Free Exercise claims to an exemption from provisions of an otherwise applicable statute, this Court has likewise expressed concern over excessive entanglement either of the government in religious affairs or, occasionally, of religious bodies in governmental affairs.[16] And

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[14]*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Church of the Holy Trinity v. United States* 143 U.S. 457 (1892); *Gonzalez v. Archbishop* 280 U.S. 1 (1929); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Presbyterian Church v. Mary Elizabeth Blue Hall Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Jones v. Wolf*, 443 U.S. 595 (1979).

[15]*See*, e.g., *Bob Jones University v. United States*, 103 S.Ct. 2017 (1983); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 507 (1979; *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *California v. Grace Brethren Church*, remanded on jurisdictional grounds, 457 U.S. 393 (1982); and *see* Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum. L.Rev. 1373 (1981).

[16]*See*, e.g., *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (inquiry limited to sincerity, not truth or falsity, of religious belief); *United States v. Seeger*, 380

in the context of cases most closely analogous to the instant case, involving various forms of public financial aid to students attending church-related schools or to their parents or directly to the institutions, this Court has likewise been concerned with the possibility that the administration of the funding scheme might involve the government excessively in religious affairs by means of "comprehensive, discriminating, and continuing state surveillance" *Lemon, supra*, 403 U.S. at 618, of employees of a church-related school and thus inhibit the mission of the church.[17]

This Court has the opportunity in the three consolidated *Felton* cases and in *School District of Grand Rapids v. Ball*, No. 83-990, cert. granted, 104 S.Ct. 1412 (1984), to clarify its teaching concerning administrative entanglement. For in these cases the record is abundantly clear that the administration of the federal and state statutes yields the conclusions (1) that *public school employees* perform the same secular services of teaching remedial reading, English as a second language, and math skills in the public and nonpublic schools, (2) that they use the same curriculum and textbooks in public and nonpublic schools, and (3) that they have not engaged in any form of religious instruction in carrying out their professional responsibilities in public or nonpublic schools. On this record, because the nature of the programs under review m[illegible]s the possibility of governmental interference with religious instruction or *inhibition* of religious autonomy but an "imaginary but totally implausible" evil, *Wolman v. Walter*, 433 U.S. 229, 260 n. 6 (1977) (Marshall, J.

U.S. 163, 185 (1965) (court may not test the truth of one's faith); *Thomas v. Review Board*, 450 U.S. 707, 714-15 (1981) (religious beliefs are given Free Exercise protection unless "so bizarre, so clearly nonreligious in motivation" as to be unworthy of credence); *United States v. Lee*, 455 U.S. 252, 257 (1982), (not within judicial function and competence to determine interpretation of religious faith). Similar concerns were reflected in two recent Establishment Clause cases; *Larson v. Valente*, 456 U.S. 228, 253 n. 29 (1982) (compliance with registration requirements of charitable solicitation statute would "penetrate deeply into the internal affairs of the registering organization"); and *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505, 512 (1982) (grant of standardless veto to churches over granting of liquor licenses "enmeshes churches in the process of government").

[17]Since by its very terms, the excessive entanglement test turns on judicial perceptions of degrees, the results of application of this test have not been even. *Compare*, e.g., *Lemon, supra*, 403 U.S. at 618, and *Meek supra*, 421 U.S. at 369-372, with *Tilton, supra*, 403 U.S. at 679, and *Mueller, supra*, 103 S.Ct. at 3071.

concurring and dissenting), this Court should repudiate the implication drawn from *Meek v. Pittenger*, 421 U.S. 349, 369-372 (1975) that its teaching on administrative entanglement is a perverse form of circular, "catch-22" reasoning. The minimal degree of monitoring of public school employees required under the circumstances of the cases at bar, 34 C.F.R. 200.73(a), to ensure against governmental *advancing* of religion surely should not itself constitute proof of constitutional invalidity on grounds of governmental *inhibiting* of religion, any more than the mere fact of intradepartmental review of police behavior to insure against potential violations of the Fourth, Fifth and Sixth Amendments should constitute definitive, irrebuttable proof of impermissible conduct in the setting of an exclusionary hearing. *See*, e.g., *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984).

Since, moreover, the gist of the excessive entanglement test is the same as the prohibition against inhibiting religion found in the primary affect test, plaintiffs should not be granted third party standing to sue "on behalf of" a religious body that has allegedly suffered the harm of excessive governmental in its internal religious affairs. *Flast v. Cohen*, 392 U.S. 83 (1968), is not to the contrary, for it involved taxpayer plaintiffs who alleged that Title I injured them by *advancing*, not *inhibiting*, religion. On this view, the plaintiffs-appellees in the instant case lack standing to litigate a claim of excessive entanglement. *See also Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982); *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

5. THE CONGRESSIONAL DESIGN IN TITLE I SHOULD NOT BE INVALIDATED ON THE CONJECTURAL BASIS THAT IT MIGHT PRODUCE INTOLERABLE "POLITICAL DIVISIONS ON RELIGIOUS LINES"

In its earliest formulation in *Lemon*, *supra*, the excessive entanglement test contained the notion that judges are empowered to invalidate statutes merely because of their potential for creating "political fragmentation . . . on religious lines." 403 U.S. at 623. Like the administrative surveillance component of the excessive entanglement test, the political divisiveness component has not been applied

consistently in the decisions of this Court[18] and has been severely criticized.[19] Most recently, this Court ruled in *Mueller, supra*, that whatever vitality the political divisiveness test may once have had, it is now "confined to cases where direct financial subsidies are paid to parochial schools or teachers in parochial schools." 103 S.Ct at 3071, n. 11; *see also Lynch v. Donnelly*, 104 S.Ct. 1355, 1364-1365 (1984).

In view of the limited utility of this test arising from the narrow confines of its operation, and in view of the glaring inconsistency between this test and other tests articulated by this Court relating to other civil liberties such as freedom of the speech, *see*, e.g., *Widmar v. Vincent, supra, Brandenburg v. Ohio*, 395 U.S. 444 (1969), and freedom of the press, *New York Times v. Sullivan*, 376 U.S. 254 (1964), Amici submit that it is time for this Court to repudiate the political divisiveness test as a formal component of Establishment Clause jurisprudence. In the event that this Court still is of the view that the political divisiveness test is of continued utility in Establishment Clause cases, it should not rely on this test to invalidate Title I, for the record here reflects no evidence of intolerably "deep political divisions along religious lines." *See Wolman, supra*, 433 U.S. at 263 (Powell, J., concurring and dissenting).

II. THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN EXERCISING ITS TAXING AND SPENDING POWER TO CREATE A FLEXIBLE PROGRAM OF FINANCIAL SUPPORT THAT SUPPLEMENTS BUT DOES NOT SUPPLANT THE PRI-

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[18]Compare, *Levitt v. Committee for Pub. Educ. and Relig. Lib.*, 413 U.S. 472, 480 (1973); *Larson v. Valente*, 456 U.S. at 254; and *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. at 511, *with Walz*, 397 U.S. at 670; *Tilton*, 403 U.S. at 688-689; *Wolman*, 433 U.S. at 263 (Powell, J., concurring and dissenting); *McDaniel v. Paty*, 435 U.S. 618, 641, (1978) (Brennan, J., concurring); *Harris v. McRae*, 428 U.S. 297, 319-320 (1980).

[19]*See*, e.g., L. Tribe, *American Constitutional Law* 866-867 (1978); Esbeck, "Establishment Clause Limits on Governmental Interference With Religious Organizations," 41 Wash. and Lee L. Rev. 347, 383 (1984); Gaffney, "Political Divisiveness Along Religious Lines," 24 St. Louis U.L.J. 205 (1980); Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Ripple, "The Entanglement Test of the Religion Clauses—A Ten Year Assessment," 27 U.C.L.A.L. Rev. 1195 (1980).

MARY ROLE OF THE STATES IN PROVIDING EDUCATION

As *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), teaches, this Court is not powerless to invalidate an Act of Congress which it deems violative of the Constitution. But it is instructive that since *Marbury* was decided in 1803, only six acts of Congress have been invalidated under the First Amendment.[20] Of these cases only one, *Tilton, supra,* involved the Establishment Clause.

In the entire history of the Republic a little over a hundred federal laws have been invalidated by this Court in whole or in part.[21] By contrast, this Court has invalidated over a thousand state constitutional and statutory provisions and municipal ordinances.[22]

The sheer disproportion between invalidation of acts of Congress and of state constitutional provisions and legislative enactments cannot be explained away as a failure of nerve or a merely self-protective instinct on the part of this Court. On the contrary it reflects several themes fundamental to American constitutional jurisprudence. First, this empirical record of judicial behavior reflects a deference to constitutional determinations of the Congress as a coordinate and equal branch of government. Such deference does not, of course, strip this Court of the power to nullify an act of Congress whenever it is found to be violative of the no-establishment principle. But the very fact that this Court has invalidated only one part of one act of Congress under the Establishment Clause, *Tilton, supra,* suggests that the standard of judicial review of congressional acts such as Title I by this court is apparently less strict than that applied to dozens of state

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[20] *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *United States v. Robel*, 389 U.S. 258 (1967); *Schact v. United States*, 398 U.S. 58 (1970); *Tilton, supra; Blount v. Rizzi*, 400 U.S. 410 (1971); *Chief of Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972) (mem.)

[21] Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, 1597-1619 (1973), and 1978 *supplement* S272-S274 (1979), (listing all act of Congress held unconstitutional.) *But see INS v. Chadha*, 103 S.Ct. 2764, 2792, 2811-2816 (1983) (White, J., dissenting) (listing acts of Congress with one-House veto provisions that have been cast into constitutional doubt).

[22] *See* Congressional Research Service, *The Constitution, supra*, 1621-1785, and Supplement S276-S293 (1979).

statutes providing educational assistance to church-relating schools or to students attending these schools or to their parents.[23]

Second, this Court has traditionally deferred to the policy determinations of the Congress under the taxing and spending power. See, e.g., *Taxation With Representation v. Regan*, 103 S.Ct. 1997 (1983).

Third, this Court has likewise shown considerable deference to the Congress, and to state and local educational agencies in the financing and operation of many educational programs in this nation. See, e.g. *Wheeler v. Barrera*, 417 U.S. 402 (1974), (statutory construction of Title I allows provisions of secular services on premises of nonpublic school); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (states not required under Equal Protection Clause of 14th Amendment to equalize funding of education).

The appropriate standard for this Court to adopt in the instant cases was stated by Chief Justice Marshall long ago in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> The [Necessary and Proper Clause]. . . cannot be construed to restrain the powers of Congress or to impair *the right of the legislature to exercise its best judgment in the selection of measures*, to carry into execution the constitutional powers of the government. *Id.* at 420; see also at 415, 419. (Emphasis added.)

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[23] Antonin Scalia, former Asst. Attorney General, Office of Legal Counsel, and now a Circuit Judge on the Court of Appeals for the D.C. Circuit has written: "In the area of the Establishment Clause in particular, a stricter vigilance over the states makes special sense. At that level of government, the mere fact that a single religious sect is often a majority or a substantial plurality of the population, may present a real danger that legislation will aid a particular religion under the guise of pursuing secular, or at least nondenominational, goals. It is no accident that the Supreme Court decisions striking down state tuition plans in states with large Catholic populations repeatedly make a special point of the high proportion of the benefited students who attend Catholic schools. But in the national legislature, by contrast, no single sect predominates, and the Court can more readily allow educational or freedom-of-choice considerations to be expressed in tuition grant legislation, without fearing that these policy choices are really subterfuges for an imposition by a particular sect upon their fellow citizens." Scalia, "On Making It Look Easy by Doing It Wrong," in E. Gaffney, *Private School and the Public Good* 181 (1981).

III. THE INTENT OF FRAMERS OF THE RELIGION CLAUSES IS MANIFEST IN LEGISLATION OF THE FIRST CONGRESS SUPPORTING EDUCATION IN THE FEDERAL ENCLAVES CARRIED ON BY RELIGIOUS BODIES. A FORTIORI, THE HISTORIC PURPOSES OF THE RELIGION CLAUSES ARE NOT OFFENDED BY A PROGRAM IN WHICH PUBLIC SCHOOL EMPLOYEES RATHER THAN EMPLOYEES OF A RELIGIOUS BODY TEACH SECULAR, NOT RELIGIOUS, SUBJECTS TO DISADVANTAGED CHILDREN IN PUBLIC AND NONPUBIC SCHOOLS.

This Court has often made use of legal history as a way of discharging its responsibility of explaining to the nation the reasons that undergird its constitutional holdings. As Justice Brennan has written: "The existence from the beginning of the Nation's life of a practice . . . is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations.... This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring). See also *Marsh v. Chambers*, 103 S.Ct. 3330, 3332-3336 (1983); *Larkin v. Grendel's Den*, 459 U.S., 116, 122-123 (1982); *Larson v. Valente*, 456 U.S. 228, 244-245 (1982); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Lemon v. Kurtzman*, 403 U.S. 602, 625-642 (1971)(Douglas, J., concurring), and 642-661 (Opinion of Brennan, J.); *Walz v. Tax Commission*, 397 U.S. 664, 704-727 (1970) (Douglas, J., dissenting), *Abington School District v. Schempp*, 374 U.S. 203, 230-304 (1963)(Brennan, J. Concurring), and *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and 63-72 (Rutledge, J., dissenting).

In the instant cases the provision of federal funds in Title I for children attending nonpublic as well as public schools comes to this Court with historical antecedents as old as those deemed dispositive in *Marsh v. Chambers*, 103 S.Ct. 3330 (1983). As the Chief Justice noted in *Marsh*, historical evidence sheds light not only on what the

draftsmen intended the Establishment Clause to mean,[24] but also "on how they thought that clause applied to the practice authorized by the First Congress." It is noteworthy that the same members of Congress which enacted the Bill of Rights also voted overwhelmingly in support of the Northwest Ordinance, which provides in part: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ch. VIII, 1 Stat. 50,53,(1789). More important is that the First Congress and subsequent Congresses appropriated funds for education in the federal territories conducted by organized religious bodies, and that those federal funds were provided directly to religious institutions. R. Cord, *supra*, note 24, at 41-46 and 57-73, and C. Antieau et.al, *supra*, note 24, at 126. *A fortiori*, the historic purposes of the Religion Clauses are not offended by a program such as Title I, in which public school employees rather than employees of a religious body teach secular rather than religious subjects to disadvantaged children attending both public and nonpublic schools.

If judges reviewing cases involving the Religion Clauses prefer to resolve such cases by reference to history, they should be aware of the complexity of the historical aims of the Founding Fathers. It is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete contemporary problem.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of

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[24]See the careful reassessment of the historical evidence relating to original intent of the Religion Clauses in the Amicus brief of the United States Catholic Conference. And see E. Corwin, "the Supreme Court as a National School Board," 14 Law & Contemp. Probs. 3 (1949); E. Norman, *The Conscience of State in North America* (1964); J. O'Neill, *Religion and Education Under the Constitution* (1949); C. Rice, The *Supreme Court and Public Prayer* (1964); C. Antieau, A. Downey, E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964); M. Howe, *The Garden and the Wilderness* (1965); A Sutherland, "Historians, Lawyers, and 'Establishment of Religion,'" in D. Gianella, ed., V *Religion and the Public Order* 27 (1969); L. Levy, "No Establishment of Religion: The Original Understanding," in *Judgments: Essays on American Constitutional History* 169 (1972); W. Berns, *The First Amendment and the Future of American Democracy* (1976); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. M. Malbin, *Religion and Politics*, note 24, *supra*, at 9, 15.

A more recent historical study confirms Malbin's conclusions. Professor Robert Cord summarizes his own findings as follows:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an absolute separation or independence of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite. R. Cord, *Separation of Church and State*, note 24, *supra*, at 15.

Opponents of legislation such as that under review in the instant cases frequently make reference to the anti-establishment perspective of James Madison. For example, Madison's famous Memorial and Remonstrance in the Virginia House of Burgesses against Patrick Henry's proposal to use public funds to support Christian teachers of religion has been attached to dissenting opinions in *Everson*, 330 U.S. at 63-72, and *Walz*, 397 U.S. at 719-727. Historians have noted

the weakness of relying on the struggle in Virginia over Patrick Henry's bill as a way of understanding the mind of the Framers. For example, Professor Leonard Levy writes:

> [T]he details of no other state controversy over church-state relationships are so familiar. If, however, one is concerned with attempting to understand what was meant by "an establishment of religion" at the time of the framing of the Bill of Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals. Indeed, the abortive effort in Virginia to enact Patrick Henry's assessment bill is less important that the fact that five states actually had constitutional provisions authorizing general assessments for religion, and a sixth (Connecticut) provided for the same by statute. Had the assessment bill in Virginia been enacted it would simply have increased the number of states maintaining multiple establishments from six to seven. L. Levy, "No Establishment of Religion: The Original Understanding," note 24, *supra*, at 201.

It was Madison, moreover, who suggested that the meaning of a constitutional provision is to be ascertained from considering the "true sense in which it was adopted by the states." Letter to Thomas Ritchie, September 15, 1821, in G. Hunt, ed., IX *Writings of James Madison* 272 (1909). At the Virginia convention in 1788 called to ratify the new Constitution adopted in Philadelphia, Madison himself stated:

> Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment.... The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest. J. Elliott, Ed., III *Debates on the Federal Constitution* 330 (1836).

Professors Antieau, Downey, and Roberts have suggested that the views expressed at the Delaware General Assembly, which ratified the First Amendment on January 27, 1790, were fairly representative of the prevailing view in the other ratifying states. Antieau and his colleagues summarized those views as follows:

> The people of Delaware had come to believe during the period of the ratification of the First Amendment that participation in religious exercises should be voluntary. This did not mean that the state must be blind to religion as an institution in the lives of her citizens; the morality and prosperity of the community depended upon religion. Thus the state could recognize and protect religion, provided that this official recognition was extended on a nonpreferential basis . . . . C. Antieau et al., *Freedom from Federal Establishment*, note 24, *supra*, at 147.

In this view, the Religion Clauses were understood to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." Id. at 160; see also W. Berns, *The First Amendment and the Future of American Democracy* (1976).

When Madison was elected to the First Congress and served as floor manager of the First Amendment, he did not depart from this view that the First Amendment was intended to prohibit a *nationally* preferred religion. This may be seen in the version of the First Amendment that Madison submitted to the House of Representatives: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789).

Madison also endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter to M.L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the Appellants. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their purposes. See C. Antieau et al., *Freedom from Federal Establishment* (1964), and R. Cord, *Separation of Church and State* (1982), *supra*, note 24.

The original meaning of the Establishment Clause is reflected, for

example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833).

If legal history is to be employed in the resolution of Establishment Clause cases such as the cases at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by this Court in *Everson*. As Professor Tribe has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers - or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978).

The federal statute challenged in this case conforms to the original purpose and intent of the Establishment Clause. The statute is neutral on its face, and in its operation it is utilized by parents with students in public as well as nonpublic schools. The statute, which has been in effect for nearly twenty years, has not resulted in "imaginable but implausible" evil of the domination of any particular religion.

By reversing the judgment of the Court of Appeals, this Court could clarify that the historic purpose of the Religion Clauses was not to prohibit all forms of federal assistance to disadvantaged children attending church-related schools, but to prohibit the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, amici urge this Court to reverse the judgment of the Court of Appeals.

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On this _____ day of October, 1984, before me, a Notary Public for the State of California, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn to according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, a copy of the Motion for Leave to File Brief Amicus Curiae and the Brief Amicus Curiae of the Council for American Private Education et al. in support of the Appellants to the following attorneys of record:

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In the Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ AND BELINDA WILLIAMS, APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No. 78C 1750

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
8-11-78		COMPLAINT FILED—Summons and additional summons issued. sk (1)
8-16-78		Summons ret. and filed/executed. fy (2)
10-19-78		Notice of motion to dismiss filed. fy (3)
11-8-78		Notice of motion for an order dismissing this action, returnable on Nov. 27, 1978. Filed. ls (4)
12-14-78		By NEAHER, J.—ORDER dated 12/13/78 that defts' motion to Stay this action is GRANTED and that this action is hereby stayed pending final disposition of National Coalition for Public Education and Religious Liberty, et al vs Joseph A. Califano, supra, and G. Hugh Wamble vs Ernest Boyer, et al, supra filed. rh (5)
7-9-79		Letter filed dated July 3, 1979, recvd from Chambers from Dept, of Justice, Washington, D.C. re pending disposition in 76 C 888. rs (6)
11-13-80		Letter filed dtd 11-4-80 from Stanley Geller to Ms. Glenn in response to her request for Status Report. fc (7)
10-2-81		CALENDAR NOTICE dtd 10/2/81 setting pretrial status conference for 10/26/81 @ 4:30 p.m., filed. Copies mailed. mw (8)
10-29-81		By NEAHER, J.—CIVIL MOTION SCHEDULING ORDER dtd 10/26/81 filed. Copies mailed. mw (9)

DATE	NR.	PROCEEDINGS
12-09-81		Defendants' Notice of Motion returnable 12-18-81 at 9:30 A.M. for an order granting leave for persons to intervene as defendants, etc., filed together with Affidavit of Charles H. Wilson. gp (10)
12-09-81		Answer of Intervenor-Defendants, filed. gp (11)
12-09-81		Defendant's Appendicies, filed. gp (12)
12-09-81		Memorandum of Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams in support of their motion for leave to intervene as defendants, filed. gp (13)
12-30-81		Defendant's Notice of Appearance, filed. gp (14)
12-30-81		Federal Defendant's response to Motion to Intervene as Defendant, filed. gp (15)
12-30-81		Defendant's Notice of Motion for substitution as a party together with Memorandum in support of his motion for substitution as a party, filed. gp (16)
01-05-82		Calendar Notice dated 01-04-82 that action is set for pre-trial conference on 01-14-82 at 4:30 P.M., filed. Parties informed. gp (17)
3-15-82		BY NEAHER, J.—Stip & order dtd 3-12-82 that the SE. of the US Dept of Education is substituted as deft HHS, Paragraph 20 is amended to add 42 USC 1983 & 1988; etc., and Leo Pfeffer, be added as atty for pltffs, filed. (see stip for details) el (18)
4-12-82		Letter from Elisa Vela, Atty, Federal Programs Branch, USDJ to Clerk, in re: enclosing deft U.S. Secretary of Eduction's Notice of filing the record in National Coalition for Public Education and Religious Lib-

DATE	NR.	PROCEEDINGS
		erty -v- Hufstedler, 446 F. Supp. 193, 489 F. Supp. 1248, filed. These papers are being filed pursuant to Stipulation. Included are: Index to Exhibits, Defts' Exhibit A, Defts' Exhibits B through Defts' Exhibits G through K, Defts' exhibits L through T, Defts' exhibit U—Volume I and defts' exhibit U Volume II, and Trial transcript. el (19)
04-14-82		Plaintiffs' Memorandum of Law in support of their motion for summary judgment, filed. gp (20)
5-12-82		Def's Joint Statement of Material Facts not in dispute filed. em (21)
5-12-82		Memorandum in Support of Def's Joint Cross-Motion for summary judgment & in opposition to pltff's motion for summary judgment filed. em (22)
5-17-82		Letter dated 5/14/82 from Elisa B. Vela, Atty Fed. Programs Branch Civil Div., to Richard H. Weare, Clerk, U.S.D.C.E.D.N.Y., enclosing Defts' Memo of Law in Support of Defts' Joint Cross-Motion for Summary Judgment and In Opposition to Pltffs' Motion for Summary Judgment and Affidavit of John F. Staehle and advising that Defts' Joint Motion and Statement of Facts Not in Dispute have been filed under separate cover by the nonfederal defts filed. rh (23)
5-17-82		Memorandum of Law in Support of Defts' Joint Cross-Motion for Summary Judgment and in Opposition to Pltffs' Motion for Summary Judgment filed together with annexed Affidavit of John F. Staehle, Deputy Director of Compensatory Education Programs, Office

DATE	NR.	PROCEEDINGS
		of Elementary and Secondary Education, U.S. Dept. of Education dated 5/12/82 rh (forwarded to chambers) (24)
6-1-82		Pltffs' counter-statement of material facts not in dispute, filed. (25)
6-1-82		Reply affidavit of Stanley Geller, filed. el (26)
6-1-82		Pltffs' reply memo filed. el (27)
10-11-83		By Neaher, J.—Memorandum and Order dated 10.04.83 that defts' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied, filed. Clerk to enter judgment dismissing complaint. gp (28)
10-20-83		Clerk's Judgment dated 10.17.83 that the plaintiffs take nothing of the defts; that the defts. motion for summary judgment is granted; that the plaintiffs' motion for summary judgment is denied; and that judgment is entered in favor of defts. dismissing the complaint, filed. Parties informed. gp (29)
12-02	30	*** *NOTICE OF APPEAL* (pltffs-appellants) from judgment entered 10-20-83, filed with receipt #54049 for C of A docketing fee. C of A notified. Parties informed. vw
1984		
01-17	—	Record on appeal certified & sent to C of A. Ack req. vw
01-23	31	Macchiarola's Notice of cross-motion returnable 05.26.82 at 9:30 A.M. for an order pursuant to Rule 56(c), etc., filed together with Supplemental Affidavit of Lawrence F. Larkin. gp

09/04/84

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Title: Felton v Sec. US Dept of Education
Case Type: CV US
NOA: 12/02/83
Date Docketed: 12/08/83

Dkt: 83-6359
Calendar: 830964
Fee: Pd

Origin: ENY
Division: Brooklyn
Action Filed: 08/11/78
Nature of Suit: 1440

DC-Dkt: 78 CV 1750
DC-J: Neaher, Edward R.
DC Judgment Date: 10/20/83

FORMS, RECORD AND BRIEFING ACTIVITY

Local Rules Forms: 12-09-83
Sufficient Record on Appeal: 02/07/84
Supplemental Record(s) on Appeal:
Last Appellant's Brief: 02/07/84
Last Appellee's Brief: 03/30/84
Last Reply Brief:

ARGUMENT, SUBMISSION, DECISION AND MANDATE ACTIVITY

Argument Date: 04/04/84
Submission Date:
Judge 1: Feinberg, Wilfred
Judge 2: Friendly, Henry J.
Judge 3: Oakes, James L.

Writing Judge: Friendly, Henry J.

Decision Type: Rev

Decision Method: Pub.Sign.Opn
Decision Date: 07/09/84
Mandate Issued:

Citation:

Reopened:

REHEARING AND SUPREME COURT ACTIVITY

Petition for Rehearing Filed:
Petition for Rehearing Decision:
Decision Date:
Mandate Receipt:

Cert. Filed: 08/13/84
Cert. Decision:
Decision Date:
ROA Receipt:

PARTIES AND COUNSEL

Party Name: Felton, Betty-Louise — Type: Pla.A

Attorney: Geller, Stanley, Esq.
Butler, Jablow & Geller
400 Madison Avenue
NY, NY 10017
755-2040 — Atty Type: PRI

Reply Brief

First Brief: 02/07/84 — Second Brief: 3/30/84

Party Name: Green, Charlotte — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Hruska, Barbara — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Schwartz, Meryl A. — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Side, Robert H. — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: Zelon, Allen H. — Type: Pla.A

Attorney: See Previous Attorney Entry — Atty Type:

Party Name: "Secretary, U.S. Dept. of Education" — Type: Dft.E

Attorney: Steinmeyer, Anthony J.
US Dept. of Justice
Appellate Staff, Civil Division,
RM 3617
Washington, DC 20530
FTS 633-3388 — Atty Type: USDJ

First Brief: 03/21/84 Second Brief:

Party Name: "Chancellor of the Board of Education" Type: Dft.E

Attorney: Schwarz, Frederick A.O. Atty Type: Pri
Corporation Counsel of the City of New York
100 Church Street
NY, NY 10007
566-4331

First Brief: Second Brief:

Party Name: Aguilar, Yolanda Type: Intv

Attorney: Delehanty, John, Esq. Atty Type: Pri
Parker, Auspitz, Neesemann & Delehanty, P.C.
415 Madison Avenue
NY, NY 10017
355-4415

First Brief: Second Brief:

Party Name: Colon, Lillian Type: Intv

Attorney: Buckley, John J. Jr. Atty Type: Pri
Williams & Connolly
839 17th Street, NW
Washington, D.C. 20006
202-331-5051

First Brief: Second Brief:

Party Name: Martinez, Miriam Type: Intv

Attorney: See Previous Attorney Entry Atty Type:

Party Name: Williams, Belinda Type: Intv

Attorney: See Previous Attorney Entry Atty Type:

MOTIONS

Party: Aguilar (I)		Date Filed: 02/23/84
Desc: File Mot: Extend Time to File Brief	Disp: GR	Date: 02/28/84
Party: U.S. Dep't of Educ. (E)		Date Filed: 02/27/84
Desc: Extend Time to File Brief	Disp: GR	Date: 03/06/84
Party: Chancellor-Bd. of Educ. (E)		Date Filed: 02/28/84
Desc: File Motion & Brief Out of Time	Disp:	Date:
Party: Sec, US Dept of Ed (E)		Date Filed: 07/30/84
Desc: Stay Issuance of Mandate	Disp: GR	Date: 08/06/84

SCHEDULED ACTIONS

Description	Due	Extended SO	Satisfied
Index on Appeal	01/21/84		02/07/84
Record on Appeal	02/07/84		02/07/84
Appellant's Brief and Appendix	02/07/84		02/07/84
Appellee's Brief	03/05/84	03/20/84	03/30/84

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

78C 1750

NEAHER, J.

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare; ERNEST L. BOYER, United States Commissioner of Education; and FRANK J. MACCHIAROLA, Chancellor of the Board of Education of the City of New York, DEFENDANTS

COMPLAINT

Plaintiffs, by their attorney, respectfully allege:

1. This is a civil action brought by the plaintiffs for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in religious schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 26, U.S. Code, Sections 1331, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000), as more fully appears hereinafter.

4. Each of the plaintiffs herein is a citizen of the United States and pays income taxes and other taxes to the United States and each is a qualified legal voter of the United States.

5. Each of the plaintiffs herein is a resident and legal voter of the State of New York and of the Eastern District of New York.

6. Defendant Joseph A. Califano is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity.

7. Defendant Ernst L. Boyer is the United States Commissioner of Education and is sued herein in that capacity.

8. Defendant Frank J. Macchiarola is Chancellor of the Board of Education of the City of New York and is sued herein in that capacity.

9. In 1965, the Congress of the United States enacted and, on April 11, 1965, the President of the United States approved P. L. 89-10, known as the Elementary and Secondary Education Act of 1965 (hereinafter the Act), Title I whereof authorizes federal financial support for special educational programs for educationally deprived children in attendance areas where low income families are concentrated. Section 205 (20 U.S.C. 241e-1(a) as amended) of the Act provides in part that, in order for a local educational agency to qualify for support from the Federal Government under such Title I, it must appear "that to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . ."

10. The Elementary and Secondary Education Act of 1965 authorizes, empowers and requires the defendant Ernest L. Boyer, in his capacity as Commissioner of Education, to pass upon all applications for federal funds to finance programs under the Act and to withhold approval from any program which does not comply with the terms, conditions and limitations of the Act.

11. Defendants Califano and Boyer have construed and applied Title I of the Act to authorize local educational agencies to assign teachers and other personnel to religious schools in order to perform educational services therein during regular school hours, and have approved the expenditure of federal funds to finance these services.

12. Defendant Macchiarola in his capacity as Chancellor of the Board of Education of the City of New York, a local educational agency, has submitted to the defendants Califano and Boyer plans for the use of Title I funds to finance the assignment of teachers and other personnel to perform educational services within the religious schools of New York City during regular school hours, and with their approval has used Title I funds for such purpose.

13. On the 19th day of May, 1975, the United States Supreme Court, in the case of *Meek* v. *Pittenger*, held that the use of tax raised funds to finance educational services performed during regular school hours on religious school premises violates the Establishment Clause of the First Amendment of the United States Constitution.

14. Notwithstanding the aforesaid decision, the defendants have continued to use Title I funds to finance the assignment of teachers to perform educational services within religious schools during regular school hours and have refused to discontinue these practices although due demand therefor has been made.

15. There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local educational agencies which would qualify them for the receipt of federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are those to provide pupil health and dental benefits in public and nonpublic schools and programs for special instruction in courses such as reading, arithmetic, music and art, and for guidance conducted on publicly owned premises after regular school

hours and open equally to children regularly registered in public and nonpublic schools.

16. On information and belief, large sums of federal funds, the exact amounts whereof are not known to the plaintiffs but far exceeding the sum of $10,000, have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance and aid, in whole or in part, educational services performed within religious schools during regular school hours.

17. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

18. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

19. Insofar as Title I of the Elementary and Secondary Execution [sic] Act of 1965 authorizes the use of federal funds to support, in whole or in part, the assignment of teachers and other personnel to perform educational services within religious schools during regular school hours, it violates the First Amendment of the United States Constitution in that it constitutes a law respecting an establishment of religion.

20. The plaintiffs pray that the following relief be granted:

(1) that the defendants and each of them be enjoined from approving or carrying out any program for the expenditure of federal funds to finance, in whole or in part, the performance of educational services in religious schools during school hours;

(2) that the Court adjudge and declare that insofar as Title I of the Act authorizes the expenditure of federal funds to finance educational services in religious schools during school hours it is unconstitutional as violative of the Establishment Clause of the First Amendment;

(3) that a preliminary injunction pending trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein;

(4) that the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ Stanley Geller
STANLEY GELLER
400 Madison Avenue
New York, N.Y. 10017
(212) 755-2040
Attorney for Plaintiffs

Dated:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY LOUISE FELTON, ET AL., PLAINTIFFS

v.

JOSEPH CALIFANO, ET AL., DEFENDANTS

ORDER

Upon consideration of defendants' Motion to Stay the instant action during the pendency of two other district court actions raising related or identical issues, *National Coalition for Public Education and Religious Liberty, et al.* v. *Joseph A. Califano, et al.*, 76 Civ. 888 (S.D. N.Y., filed February 25, 1976) and *G. Hugh Wamble* v. *Ernest Boyer, et al.*, Civ. No. 77-0254-CV-W-2 (W.D. Mo., filed April 4, 1977), or, in the alternative, to dismiss the action altogether,

And the Court having considered that Motion and the Memorandum filed in support thereof, and having found that the interests of judicial economy for itself, for counsel, and for litigants would best be served by a stay of the action because (1) the prior actions which are appreciably advanced are likely to simplify the issues and assist in determinations of law; (2) proceeding with the instant action at this time serves no useful purpose other than duplication; and (3) the hardship or inequity which the defendants will suffer outweighs any interest the plaintiffs may have in proceeding with the litigation; it is this 13th day of December, 1978,

ORDERED that defendants' Motion be and hereby is granted,

And that this action is hereby stayed pending final disposition of *National Coalition for Public Education and Religious Liberty, et al.* v. *Joseph A. Califano, supra,* and *G. Hugh Wamble* v. *Ernest Boyer, et al., supra.*

/s/ Edward H. Neaher
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

78 Civ. 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare; ERNEST L. BOYER, United States Commissioner of Education; and FRANK J. MACCHIAROLA, Chancellor of the Board of Education of the City of New York, DEFENDANTS

ANSWER OF INTERVENOR-DEFENDANTS

The intervenor-defendants, by and through their undersigned attorneys, for their answer to the correspondingly-numbered paragraphs of the complaint herein; allege as follows:

1. Deny, except admit that the plaintiffs seek to enjoin certain applications of Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. § 2701, *et seq.*

2. Deny, except admit that this Court has jurisdiction pursuant to Title 28 U.S.C. § 1331.

3. Admit.

4-5. Deny sufficient information to form a belief as to the truth of the allegations of these paragraphs.

6-7. Deny.

8. Admit.

9. Deny, except admit that, in 1965, the Congress of the United States enacted and the President of the United States approved P. L. 89-70, known as the Elementary and Secondary Education Act of 1965, and refer to that statute for the full terms and legal effect thereof.

10. Deny, except admit that the duties ascribed to Ernest L. Boyer have been transferred by statute to Terrell H. Bell, the Secretary of the United States Department of Education.

11. Deny, except admit that responsible federal officials have construed Title I of the Elementary and Secondary Education Act of 1965 to permit local educational services on the premises of nonpublic schools during regular school hours.

12. Deny, except admit that defendant Frank J. Macchiarola has submitted to responsible federal officials for approval plans of the New York City Board of Education to use Title I funds to pay the salaries of public schools in New York City during regular school hours.

13. Deny, except admit that the United States Supreme Court issued an opinion in *Meek* v. *Pittenger*, 421 U.S. 349, on May 19, 1975, and refer to that opinion for the full terms and legal effect thereof.

14. Deny, except admit that Title I funds have been used to pay the salaries of publicly-employed teachers who provide remedial educational services to qualified students in nonpublic schools during regular school hours.

15. Deny.

16. Deny, except admit that Title I funds in excess of Ten Thousand Dollars ($10,000.00) have been expended to pay the salaries of publicly-employed teachers who provide remedial educational services at nonpublic schools during regular school hours.

17. Admit.

18-20. Deny.

Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, intervenor-defendants request that the complaint be dismissed with prejudice and that the defendants and intervenor-defendants be granted such other and further relief as this Court may deem just and proper.

Respectfully submitted,

PARKER AUSPITZ NEESEMANN
& DELEHANTY P.C.

By /s/ Illegible
415 Madison Avenue
New York, New York 10017

—and—

WILLIAMS & CONNOLLY
839 17th Street
Washington, D.C. 20006

Attorneys for
Intervenor-Defendants

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HIRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

STIPULATION

It is hereby stipulated and agreed by the parties, through their respective counsel, as follows:

1. The Secretary of the United States Department of Education is substituted as defendant in this action for his predecessors Joseph A. Califano, Secretary of Health, Education and Welfare and Ernest Boyer, Commissioner of Education. The case caption is amended to reflect this substitution.

2. Paragraph 2 of the complaint is amended to add 42 U.S.C. 1983 and 42 U.S.C. 1988.

3. Paragraph 20 of the complaint is amended to add the following:

"(5) that the plaintiffs be granted the costs and disbursements and counsel fees in accordance with 42 U.S.C. 1988,"

4. Leo Pfeffer, 15 East 84th Street, New York, New York 1028, [sic] (212) 879-4500, is added as an attorney for the plaintiffs.

5. The Title I program of the City of New York, as presented by the testimonial and documentary evidence in *National Coalition for Public Education and Religious Liberty* v. *Hufstedler*, 446 F.Supp. 193, 489 F.Supp. 1248, appeal dismissed for want of jurisdiction, 101 S.Ct. 55 (1980), is substantially the same and is hereby made part of the record in this action.

Defendants shall file said record on or before April 12, 1982, the date on which plaintiffs shall file their motion for summary judgment.

Defendants shall have to and including May 12, 1982, the date of the filing of their response, within which to file updating materials or figures.

6. On or before April 12, 1982, the plaintiffs shall move for summary judgment for the relief prayed for in the complaint.

7. On or before May 12, 1982, the defendants shall respond to plaintiffs' motion and, if they deem fit, cross-move for summary judgment dismissing the complaint.

8. On or before May 26, 1982, the plaintiffs shall, if they deem fit, reply to the defendants' motion.

9. Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams may be admitted as intervenor-defendants in this action and the caption of the action shall be changed accordingly. By signing this Stipulation through their attorneys, the intervenors agree to be bound by its terms, including the schedule of dates set forth in paragraph 6, 7 and 8 of the Stipulation.

10. The parties agree that this Stipulation be entered as an order of the Court.

11. Counsel for defendant Macchiarola, Lorna Goodman, has consented to the terms of this Stipulation and authorized counsel for the federal defendant to sign this Stipulation on her behalf.

12. Counsel for defendant-intervenors, Joseph C. Markowitz, has consented to the terms of this Stipulation and

authorized counsel for the federal defendant to sign this Stipulation on his behalf.

/s/ Stanley Geller
STANLEY GELLER
Butler, Jablow & Geller
400 Madison Avenue
New York, New York 10017
(212) 755-2040
Attorney for Plaintiffs

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500
Attorney for Plaintiffs

/s/ Elisa B. Vela
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Civil Division, Room 3337
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Washington, D.C. 20530
(202) 633-3346
Attorney for Federal Defendant

/s/ Lorna Goodman by EBV
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Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
(212) 566-3474
Attorney for Defendant Macchiarola

/s/ Joseph C. Markowitz by EBV
JOSEPH C. MARKOWITZ
Parker, Auspitz, Neesemann & Delahanty
415 Madison Avenue
New York, New York 10017
(212) 355-4415
Attorney for Defendant-Intervenors

Dated: March 5, 1982.

IT IS SO ORDERED this 12th day of March, 1982.

/s/ Edward R. Neaher
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HIRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

NOTICE OF FILING

The parties to this action have agreed and stipulated that the record consisting of testimonial and documentary evidence in *National Coalition for Public Education and Religious Liberty* v. *Hufstedler*, 446 F.Supp. 193, 489 F.Supp. 1248, appeal dismissed for want of jurisdiction, 101 S.Ct. 55 (1980), has remained substantially the same * and that it be made a part of the record in this action. Accordingly, pursuant to that stipulation, defendant Secretary of the United States Department of Education, through his counsel, herein submits on behalf of all the parties, a true and correct copy of said record. The record consists of the following:

---

* The parties have stipulated further that defendants shall have to and including May 12, 1982 within which to file updating materials or figures.

Exhibit	Description	Offered By
A	Application and program plan for the New York City Board of Education's Program of Title I Services for Nonpublic School Students, 1978-1979	Lawrence F. Larkin
B	Memorandum from Frank J. Macchiarola to Principals of Nonpublic Schools, March 1, 1979, *re* Identification of ESEA Title I Eligible Nonpublic School Pupils Residing in Designated ESEA Title I Target Areas, 1979-1980	Lawrence F. Larkin
C	Memorandum from Lawrence F. Larkin to Principals of Nonpublic Schools Enrolling Pupils Eligible for ESEA Title I Services, May 24, 1978	Lawrence F. Larkin
D	Volume I of memoranda and directives relating to administration of New York City's Title I program for nonpublic school students	Lawrence F. Larkin
E	Volume II of memoranda and directives relating to administration of New York City's Title I program for nonpublic school students	Lawrence F. Larkin
F	Volume III of of [sic] memoranda and directives relating to administration of New York City's Title I program for nonpublic school students	Lawrence F. Larkin
G	Standard requisition form of the Bureau of Supplies of the New York City Board of Education	Lawrence F. Larkin
H	Inventory control label for equipment used in nonpublic school Title I program	Lawrence F. Larkin
I	Equipment inventory card for the nonpublic school Title I program	Lawrence F. Larkin

Exhibit	Description	Offered By
J	Memorandum from Lawrence F. Larkin to Principals of Nonpublic Schools and Title I Staff Members, June 6, 1978, *re* Equipment Inventory	Lawrence F. Larkin
K	Bound volume of memoranda from Lawrence F. Larkin to principals of nonpublic schools	Lawrence F. Larkin
L	New York City Board of Education Resolution of August 31, 1966, with accompanying "Statement by Board of Education on Title I Proposals"	Lawrence F. Larkin
M	Letter from William F. Pierce, Acting United States Commissioner of Education, to Arthur L. Mallory, Missouri Commissioner of Education, July 22, 1976, with accompanying Report on the On-Site Investigation of the Participation of Private School Children in Title I, ESEA, in Jefferson City, Kansas City, St. Louis, and St. Joseph, Missouri, May 24-28, 1976	Lawrence F. Larkin
N	Analysis of Difference in Costs and Services for On-Premises and Off-Premises Services to Nonpublic School Pupils During the Regular School Day	Lawrence F. Larkin
O	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: Corrective Reading Component, 1975-1976	Lawrence F. Larkin
P	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: Reading Skills Center Component, 1975-1976	Lawrence F. Larkin
Q	Evaluation report — Corrective Mathematics Services for Eligible Nonpublic School Pupils, 1975-1976	Lawrence F. Larkin

Exhibit	Description	Offered By
R	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: English as a Second Language, 1975-1976	Lawrence F. Larkin
S	Evaluation report — Central ESEA Title I Remedial Services for Eligible Nonpublic School Pupils: Clinical and Guidance Services, 1975-1976	Lawrence F. Larkin
T	Narrative Summary of Defendants' Written Evidence	Agreement of Counsel
U	Two bound volumes of affidavits of persons involved in or affected by the administration of New York City's nonpublic school Title I program	Agreement of Counsel
TRIAL TRANSCRIPT	Hearing before Judge Tenney on May 10, 1979	——

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HIRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
and FRANK J. MACCHIAROLA, CHANCELLOR OF THE
BOARD OF EDUCATION OF THE CITY OF NEW YORK,
DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ
and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

DEFENDANTS' JOINT STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. *FEDERAL ASPECTS OF THE TITLE I PROGRAM*

A. *Statutory and Regulatory Overview*

1. Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. § 2701, *et seq.*, *as amended*, was enacted in 1965 to provide a mechanism for funding compensatory educational programs administered by local public education agencies and directed to educationally deprived children in low-income areas. The basis for this new approach was the documented finding that learning deficiencies and poverty are positively and significantly

correlated. S. Rep. No. 146, 89th Cong., 1st Sess., U.S. Code Cong. and Admin. News 1446, 1450 (1965).

2. In enacting the Elementary and Secondary Education Act of 1965, Congress expressly recognized that "the special educational needs of children of low-income families and the impact [of] concentrations of low-income families" seriously impaired the ability of local school boards to support adequate educational programs for such children. 20 U.S.C.A. § 2701. Congress, therefore, declared it to be the policy of the United States "to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." *Id.*

3. Under Title I, grants may be provided to several types of agencies. These agencies include (a) state public agencies that are directly responsible for the education of children in institutions for neglected and delinquent children, 20 U.S.C.A. § 2781; (b) state public agencies that are directly responsible for the education of handicapped children, 20 U.S.C.A. § 2771; (c) state public educational agencies for programs for migrant children of migrant agricultural workers, 20 U.S.C.A. § 2761; and (d) local public educational agencies for children in locally operated institutions for neglected and delinquent children, 20 U.S.C.A. § 2783. This suit concerns grants to local public educational agencies f " educationally deprived children in certain attendance areas. 20 U.S.C.A. § 2711. The term "local educational agencies" means a public board of education or other public authority, legally constituted within the state to have administrative control and direction over, or to perform a service or function for, public elementary and secondary schools within a city, county, township or other political subdivision within a state. 20 U.S.C.A. § 2854(10). The local edu-

cational agency involved in this case is the New York City Board of Education. Def. Exh. U (Tab A-4, ¶ 14).

4. The Act provides for annual appropriations by the Congress to support programs proposed by local educational agencies ("LEAs") and approved by state educational agencies ("SEAs"). 20 U.S.C.A. § 2731. All such programs are administered solely by the LEA in the affected localities, and staffed solely with employees of the LEA. 20 U.S.C.A. § 2734(m). The Title I program is administered at the federal level by the United States Commissioner of Education. 20 U.S.C.A. § 2702 *et seq.*

5. The educational services that may be provided under Title I include remedial training in reading and mathematics, the teaching of English as a second language, diagnostic testing, and special programs for the physically handicapped. Def. Exh. U (Tab A-1, ¶ 4).

6. Title I programs are made available to children regardless of whether they attend a public or a nonpublic school. The only bases for eligibility are that the school district and attendance area in which the children reside contain a specified concentration of children of families below the poverty level and that the child be educationally deprived. 20 U.S.C.A. § 2733(a); 34 C.F.R. §§ 201.50-201.52, 201.70-201.71. Educationally deprived children are those who need special educational assistance to raise their educational attainment to that appropriate for children of their age. 34 C.F.R. § 201.4.

7. Title I establishes the formula for measuring the maximum grant that the SEA may make to any LEA. 20 U.S.C.A. § 2711(a)(2)-(3); 34 C.F.R. § 201.12. The size of grants to be awarded to the various LEAs is based upon the distribution of children from low-income families. 20 U.S.C.A. § 2711(a)(2)-(3); 34 C.F.R. § 201.12.

8. In addition, special grants are made available for funding programs for LEAs in states that have a substantially greater than average per-pupil expenditure for remedial educational programs. 20 U.S.C.A. §§ 2721-22.

9. Funds under Title I may be provided by the SEA to the LEA only for programs that meet the statutory criteria. As a condition for being authorized to draw upon Title I funds, the SEA must file an application and a program plan that contains assurances that the SEA will permit expenditures only for approved projects and that those projects will comply with the requirements of Title I. 20 U.S.C.A. §§ 2802, 2811. The plans submitted to the SEA by LEAs must include a statement describing the purposes for which the federal funds to be supplied under Title I will be used during the fiscal years for which the program plan is submitted. 20 U.S.C.A. § 2731.

10. To be eligible for Title I funding, an LEA must submit an approvable application to the SEA. 20 U.S.C.A. § 2731. To be approvable, the application must demonstrate that the LEA will meet, *inter alia*, the following criteria:

(a) Payments will be made only for the costs of programs and projects which will supplement rather than supplant non-federally funded programs that would have been made available in the absence of Title I funds. 20 U.S.C.A. § 2736(c); 34 C.F.R. § 200.92, 201.130-201.144.

(b) Programs and projects funded with Title I funds will be designed to meet the special educational needs of educationally deprived children in attendance areas having high concentrations of children from low-income families and will be of sufficient size, scope and quality to give reasonable promise of meeting the affected children's special educational needs. 20 U.S.C.A. § 2734(a), (d).

(c) Eligible nonpublic school children must be able to participate on an equitable basis in suitable Title I programs. 20 U.S.C.A. § 2740; 34 C.F.R. § 76.654.

(d) Title I funds will be controlled and administered soley by the LEA. 20 U.S.C.A. § 2734(m).

(e) The LEA will provide for the measurement of program effectiveness on a regular basis and will provide sufficiently detailed information to the SEA to enable it

to determine student achievement and local compliance with the requirements of Title I. 20 U.S.C.A. §§ 2734(g), 2821.

(f) Information derived from educational research, demonstration and similar projects will be disseminated to administrators and teachers, and promising educational innovations derived thereby will be adopted by the LEA. 20 U.S.C.A. § 2734(h).

(g) An advisory council for the school district and separate councils for each school in which Title I programs are carried out will be established, composed principally of the parents of eligible children, and authorized to advise the LEA on planning, implementation and evaluation of Title I programs. 20 U.S.C.A. §§ 2734(j), 2735; 34 C.F.R. §§ 201.150-201.162.

11. In making its application to the SEA for Title I funding, the LEA must demonstrate that it has taken the following steps in formulating its proposed programs or projects:

(a) reviewed all available data, including that developed from prior Title I projects, to determine the incidence and severity of educational deprivation among children;

(b) selected the eligible attendance areas to be served (project areas), the age or grade level of the children to be served, and the particular types of educational needs that the projects will address;

(c) identified all educationally deprived children in the target age or grade within the project area who have the type of educational needs that the projects are designed to satisfy;

(d) selected those educationally deprived children identified in (c) who are most in need of special assistance;

(e) specified the criteria by which educationally deprived children in the project area are to be selected to participate in the Title I projects;

(f) employed adequate diagnostic techniques to determine the special educational needs of the children chosen to participate in the Title I projects; and

(g) consulted with teachers, parents and other knowledgeable persons concerning the needs of the children to be served in the project areas. 20 U.S.C.A. §§ 2731-34; 34 C.F.R. §§ 200.30-200.31.

12. The LEA's application must also describe in detail, *inter alia*, the proposed project, including its objectives and their relationship to the children's educational needs, the staff and material to be utilized, the time periods and locations for the project services, the number of children involved and their educational needs, the evaluation techniques to be utilized, the budget required for the project, and plans for consultation with parents. 20 U.S.C.A. §§ 2731-34; 34 C.F.R. §§ 201.40-201.41.

13. The SEA may approve the project only if it is consistent with the requirements listed in paragraphs 10, 11 and 12, *supra*, and if the SEA finds that: the project shows reasonable promise of meeting the special educational needs of the participating children; the evaluation techniques are adequate; the project is large enough and yet sufficiently concentrated to give reasonable promise of attaining its educational objectives; the project is not designed to meet, and will not meet, the general needs of any school or student body at large; the Title I services will be directed only to eligible children selected in accordance with the procedures set forth in the Department's regulations; educational services financed by state and local funds are provided on an equitable basis to all children in the public schools without regard to the availability of Title I funds; and such services are provided on an equitable basis to eligible nonpublic as well as public school students. 20 U.S.C.A. §§ 2811, 2821; 34 C.F.R. §§ 76.654, 200.110-200.113.

14. Since eligibility to participate in Title I programs is not limited to children in public schools, special provi-

sion is made in the Title I statute and in the regulations issued thereunder by the Department of Health, Education and Welfare to assure that such services are available to all educationally deprived children in project areas. Specifically with respect to educationally deprived children enrolled in private schools and residing within the project area, the statute and regulations require that the LEA provide genuine opportunities to participate in Title I educational services that meet their special educational needs. 20 U.S.C.A. §§ 2732-33, 2740; 34 C.F.R. §§ 76.651, 76.654.

15. Among the alternatives for such participation are dual enrollment, educational radio and television, and educational services and equipment on other than public school premises. More generaly, [sic] the LEA is required to determine the needs of educationally deprived children enrolled in private schools and meet those needs on a basis comparable in quality, scope and opportunity for participation to that used in providing for participation in the program by educationally deprived children enrolled in public schools. 20 U.S.C.A. § 2740; 34 C.F.R. § 76.654.

16. To assure that Title I funds are used only for their designated purpose of correcting educational deprivation among children in poverty-stricken areas and not to aid either public or nonpublic schools or other institutions, the Title I regulations provide that Title I funds may not be used to provide services that would otherwise be provided to the children served by Title I. 34 C.F.R. § 76.658.

17. To assure that all Title I programs are secular both in content and in setting, the Title I regulations impose a number of restrictions on the services to be provided to nonpublic school students. They include the following:

(a) Public school personnel may be made available on other than public school premises only to the extent necessary to provide special services (including therapeutic,

remedial, welfare and health services, guidance and counseling and breakfast programs for poor children) to those educationally deprived children for whom the Title I projects were designed, and only if such services are not otherwise provided in the nonpublic schools. 34 C.F.R. §§ 76.658, 76.659.

(b) The LEA must maintain exclusive direction and control over the provision of Title I services, wherever they are provided. 34 C.F.R. § 76.661.

(c) Nonpublic school teachers are not to be paid in a Title I project except to perform services outside their regular hours of duties and under public supervision and control. 34 C.F.R. § 76.660.

(d) Control over the use of all Title I funds and all property acquired with such funds must remain in the LEA. The LEA must maintain title to such property. If Title I equipment is to be used in a project conducted on the premises of a nonpublic school, the LEA must retain sole control of the equipment, as well as of the project itself, and must remove the equipment from the nonpublic school premises, if necessary, to prevent its being used for any purpose other than as part of the Title I project. 34 C.F.R. § 76.661.

(e) Any project carried out on the premises of a public school and involving joint participation of public and nonpublic school children must avoid classes separated according to school enrollment or religious affiliation of the children. 34 C.F.R. § 76.657.

18. Failure by the SEA to comply with any of the requirements of Title I pertaining to approval of local projects, disbursement of funds or supervision of the LEA results in a termination or suspension of funding. 20 U.S.C.A. § 2836(a); 34 C.F.R. §§ 200.260-200.263. If, however, the LEA is prohibited by state or local law from providing for participation by nonpublic school students on an equitable basis in Title I programs or substantially fails to do so, the United States Commissioner of Education is required to waive the statutory requirement that

the state provide for such participation, and instead arrange directly for the provision of Title I services to eligible children enrolled in nonpublic schools. 20 U.S.C.A. § 2740(b); 34 C.F.R. §§ 201.90-201.97.

B. *The Scope of the Title I Program*

19. Title I programs are conducted throughout the United States, Puerto Rico and outlying territories. In the 1980-1981 school year, approximately 5,200,000 public school children and approximately 190,000 nonpublic school children received educational and related services through Title I projects. Affidavit of John F. Staehle ¶ 3.

20. For the 1982 fiscal year, approximately $3,100,000 has been allocated to grants under Title I. Affidavit of John F. Staehle ¶ 3.

C. *The Missouri Study*

21. In February, 1976, the United States Commissioner of Education received a written complaint from representatives of nonpublic school children in Missouri to the effect that the Title I services provided to educationally deprived children enrolled in nonpublic schools in the State of Missouri were not equitable—that is, not comparable to the services provided to such children enrolled in public schools. Def. Exh. U (Tab A-2, ¶ 4). The basis for the complaint was that, while eligible public school children participated in Title I remedial programs during the regular school day, children enrolled in nonpublic schools received such instruction only early in the morning before school had begun, or late in the afternoon after school had ended, or else on Saturdays or in the summer. Missouri officials had construed state law as prohibiting the provision of such services to nonpublic school children at their schools during school hours. *Id.* at ¶ 5.

22. Since the Commissioner is required, under Title I, to arrange directly for the provision of services to eligible

nonpublic school students if the state agency is not providing "comparable" services to them, a study was conducted by representatives of the Commissioner to determine whether Title I projects conducted before or after the school day on the premises of nonpublic schools were comparable to the services provided public school students during the day. Def. Exh. U (Tab A-2, ¶ 6).

23. The first stage of the study was to investigate Title I services in four large LEAs in Missouri. This investigation included on-site visits to the LEAs during the week of May 24-28, 1976. The investigation also included a review of budget statistics and attendance data for eligible public and nonpublic school students, and interviews with Title I administrators and teachers, public and nonpublic school officials and teachers, and parents of public and nonpublic school children, including members of the Title I Parent Advisory Councils. Def. Exh. M; Def. Exh. U (Tab A-2, ¶¶ 7-13).

24. The investigation demonstrated that Title I services provided in the four LEAs at times other than during the school day were not, and probably could not, be comparable in quality, scope and opportunity for participation, to services provided during the regular school hours. Def. Exh. U (Tab A-2, ¶ 14).

25. The principal reasons for this inequity were found to be the following:

(a) Although planned student attendance by nonpublic school children was equivalent to planned attendance by public school children, actual participation by nonpublic school children was much lower than that of public school children because (i) nonpublic school students were too fatigued after a full day of school to attend the Title I program; (ii) the after-school program conflicted with other activities planned by the eligible students; (iii) parents were reluctant to allow their children to stay after school ended because they would then not return home until late in the day; (iv) the children often

(8%); asking classroom teachers how children are doing (8%); daily worksheets (8%); and games.

Pupil reassessment was used by all of the interviewed teachers to modify and extend individualized instruction as well as group activities.

Student Records. All teachers kept records on tests, diagnosis, and parent conferences. In addition, they indicated that they keep records of assignments (100%), materials (92%), samples of students' writings (92%), attendance (92%), assessment checklists, on-going writing needs (83%), conferences with the guidance counselors (67%), conferences with the classroom teachers (58%), and intercomponent referrals (50%). Teachers also kept records of conferences with students, anecdotal records on each student, by-yearly progress reports, paraprofessional contacts, and teachers.

Related Duties. The interviewed teachers focused on the teaching aspects of their work and mentioned the related duties indicated in Table 2.

Materials. The survey responses indicated that 94% of the teachers felt that the materials in their classrooms were appropriate for the pupils they teach.

In interviews, 92% of the teachers reported the materials are appropriate and helpful. All 12 interviewed teachers reported that the Title I supervisory staff selected the materials for their use. Twenty-five percent of the teachers indicated that they helped in the selection of materials.

Support Services

Clinical and Guidance. The survey asked teachers to identify all those who referred pupils to the Clinical and Guidance Services; 96% of the teachers indicated the Title I teacher; 88%, classroom teachers; 82%, other Title I teachers; 82%, the principal; and 15%, parents. Survey respondents rated these services as extremely effective (14%), very effective (38%), somewhat effective (37%), not at all effective (1%) and don't know (6%).

TABLE 2

Teacher Duties and Activities
by the Percentage of Teachers Reporting Each Item

Duties And Activities	Percent of Teachers Responding
Selecting, screening and grouping of pupils employing standardized instrument measures of diagnosis and achievement.	100%
Diagnosing and prescribing to meet the needs of the pupils.	100%
Preparing and planning of long range instructional program to meet the pupils' needs and overcome weaknesses.	100%
Conducting the day-to day instructional program.	100%
Evaluating the strengths and weaknesses of the program as evidenced in pupil achievement.	100%
Conferring with parents and classroom teachers on the status of participants and on interchanges of suggested follow-up reinforcement activities.	100%
Referring participants to Clinicial and Guidance Services and the Reading Skills Center.	92%
Training students for tutor-tutorial program and training parents for the parent-turorial program.	42%
Planning and guiding the paraprofessional in conducting the activities in the reading classroom.	50%
Participating in on-the job training sessions and group training sessions.	75%

Ninety-two percent of the interviewed teachers indicated that the Title I teacher refers students to Clinical and Guidance services. Others identified by teachers as making referrals are the classroom teachers (42%), parents (8%), and the principal (8%).

Eighty-three percent of interviewed teachers described the Clinical and Guidance Services Program as very effective; 8%, as somewhat effective; and 8%, had no knowledge of the effectiveness: Several reasons were given in support of these evaluations: seeing a child when neces-

sary (50%); helping and/or visiting families (42%); making referrals for help (33%); arranging testing for students (25%); getting the child medical care (8%), and meeting with the teacher and principal (8%). One teacher said the guidance counselor has a "realistic approach to helping children in school situations". Seventeen percent indicated that the counselors follow-up problems and 25% reported that the counselors share information or offer advice to the teachers.

Nonpublic School Principal. Eighty-two percent of the survey respondents indicated the school principal provided orientation to the school; 61% reported that the principal arranged scheduling; 24% state the principal arranged monthly conferences and 14% that the principal arranged conferences with the regular classroom teachers.

When asked what kind of support they received from the nonpublic school principal, 50% of the interviewed teachers mentioned the principal's cooperation. When asked specifically about other kinds of help, teachers said they receive help with scheduling (83%), coordination (75%) and orientation (93%).

Title I Central Staff. Results of the survey item asking teachers to identify support services received from the central staff are:

96%—Supervisory visits

93%—Training/orientation

81%—Resource materials

78%—Ideas for new approaches

71%—Demonstration of administering and scoring tests

68%—Development of parent involvement activities

65%—Demonstration of test interpretation

64%—Selection of materials

64%—Aid in pupil diagnosis

62%—Aid in development of instructional methodologies

59%—Aid in selection/screening of pupils

When asked "What support services have you received from the Title I supervisory staff?", the 12 interviewed teachers were unclear about the time frame referred to because several of the listed services were provided at the beginning of the year while others are provided year long. Rsponses to questions about testing, diagnosis, pupil selection and prescription generally were qualified with "Yes, initially."

Ninety-two percent of the interviewed teachers indicated that the nonpublic school central staff provided training orientation, resource materials, and ideas for new approaches. Most of the teachers reported that the Title I central staff provided aid in pupil diagnosis (83%), development of parent involvement activities (83%), supervisory visits (83%), development of pupil prescriptions (75%), development of pupil prescription (75%), development of instructional methodologies (75%), selection of materials (75%), demonstration of administering and scoring tests (67%), and demonstration of test interpretation (67%). Forty-two of the teachers recognized the Title I supervisory staff as an aid in the selection and screening of pupils. In addition, teachers mentioned that they received monthly newsletters and a yearly evaluation.

Classroom Teacher. Surveyed teachers indicated the purposes for consultation with the regular classroom teacher as: assessing pupil needs and weaknesses, 85%; selecting pupils, 80%; coordinating scheduling, 72%; and motivating the interest of pupils, 42%.

All interviewed teachers consulted with the regular classroom teachers to assess pupil needs and weaknesses and to coordinate scheduling. Seventy-five percent of the teachers added that they use the consultations to find out

what the classroom teachers are teaching and/or coordinate lessons with the classroom teacher. Other purposes noted were discussions of pupil behavior and the sharing of test scores.

Parent Contact

Number and Frequency. The survey data indicate that the average number of parents met by the Title I Corrective Reading teacher was 36. The interviewed teachers met with 2% to 68% of the parents * of students they taught. The mean number of parents met was 33. Twenty-five percent of the teachers had met with less than 25% of the parents; 33% of teachers reported contact with more than 50% of the parents. No teacher saw more than 68% of the parents of the students taught. Parent-teacher contact varied from site to site. It should be noted that the teacher who serviced four schools had the least amount of parent contact. (See Table 3.)

Method. Surveyed teachers said their methods of communication with parents were face-to-face (65.5%), by telephone (12.6%), by written communication (36.1%) and by parent tutorial/workshops (17.6%). All of the interviewed teachers reported communicating with parents face-to-face. They also reported using other methods: telephone (75%); written communication (83%), and parent-turorials (17%). (See Table 4).

Initiation. Ninety-five percent of the surveyed teachers initiated the majority of teacher/parent contacts. Others who initiated contact included the regular classroom teacher (2%), the parents (2%) and the pupils (1%).

All of the interviewed Title I teachers initiated parent/teacher contacts. In addition, parents (67%), classroom teachers (42%), principal (98%), guidance counselor (8%) and one student (8%) have also initiated contacts.

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* This figure is based on the total number of parents for all sites each teacher serviced. See Table 3.

TABLE 3

Percentage of Parents Met by Each Teacher Interviewed
by Each School Site

Schools	Twelve Teachers Interviewed											
	1	2	3	4	5	6	7	8	9	10	11	12
School I												
Pupil Taught	57	97	96	70	94	51	40	20	44	31	60	19
Parents Met	59	50	35	35	16	28	14	8	10	17	14	2
Percentage	78%	51%	36%	50%	17%	54%	35%	40%	22%	54%	23%	11%
School II												
Pupils Taught	14					39	57	40	43	20	40	29
Parents Met	6					14	19	32	15	15	5	0
Percentage	42%					35%	33%	80%	34%	75%	13%	13%
School III												
Pupils Taught								39				19
Parents Met								27				0
Percentage								69%				0%
School IV												
Pupils Taught												17
Parents Met												0
Percentage												0%
TOTAL												
Pupils Taught	71	97	96	70	94	90	97	99	87	51	100	84
Parent Met	45	50	35	35	16	42	33	67	25	32	19	2
Percentage	63%	51%	36%	50%	17%	50%	34%	68%	29%	63%	19%	2%

TABLE 4

Type of Parent Contact by Each Teacher Interviewed

	Twelve Teachers Interviewed											
	1	2	3	4	5	6	7	8	9	10	11	12
Total No. of Pupils for Each Teacher	71	97	96	70	94	90	97	99	87	51	100	84
Face to Face	20%	48%	36%	50%	16%	53%	34%	50%	29%	62%	19%	2%
Telephone		15%	1%		2%	11%	7%		1%	58%	5%	6%
Written Communication	2%	15%	6%	14%	6%	5%	9%	8%	12%	11%		
Parent/Turorial				17%	4%							
Other												

Classroom and Home Involvement. The interviewed teachers reported that, with the exception of individual conferences to discuss student progress (reported by all the teachers), very few parents have been involved in the Title I Corrective Reading classrooms. However, 33% of the teachers reported at least one instance where a parent had come into the classroom to observe.

The interview teachers said they had suggested ways in which the parents could become involved in work with the children at home. These suggestions included using worksheets, readers and flashcards, reading with the children or taking them to the library, using television as a learning tool, helping their children read labels with shopping, and conversing with their children.

Major Concerns of Parents. Eighty-four percent of the survey respondents reported that the parents' major concern was that their children approach grade level academic performance; 7% checked promotion as a major concern and 7% checked other concerns.

Teachers reported in the interviews that parents were primarily concerned about promotion (33%), grades (33%), test scores (8%), improvement in reading (25%), and pupil behavior problems (25%). Other concerns included the child not reading at home (17%) and objections to the books the child was choosing (8%). One teacher said the parents were curious about the program, wondered what the children were working on and why they were taken out of the regular classroom.

Recommendations

Survey Results. Teachers were provided seven recommendations for improving the Title I Corrective Reading Nonpublic Schools Program and asked to check the one they thought was most important:

55%—More Title I teacher involvement in materials selection.

30%—Fewer students seen more often.

6%—More workshops based on Title I teacher input (re: teaching techniques).

2%—More opportunity for coordination with the classroom teacher.

2%—More opportunity for coordination with other Title I personnel.

1%—No significant improvement.

0%—More opportunity for coordination with guidance personnel.

General. General recommendations made by the teachers for improving the Title I Corrective Reading Program were more training/workshops (33%), more participation in the selection of materials (25%), more time with the students than once a week (25%), smaller groups of students (17%), more supervisory people (8%), more contact with parents (8%), more contact with the classroom teacher (8%) and more supplies (8%).

Staff Development. Recommendations relating to staff development included a desire for intervisitations and suggestions for topics for workshops. Teachers would like more help in the diagnosis and remediation or writing difficulties, in working with students with limited language knowledge and in teaching vocabulary and comprehension. Other suggestions for staff development included participation in outside conferences, informal rap sessions about problems, and demonstration lessons by colleagues.

Materials. Recommendations relating to materials focused on selection of materials by the teachers themselves and on the desire for new materials and new ideas for using them. Specific requests were a weekly or monthly newspaper for students, skill development materials (as opposed to skill practice materials), study skills materials for fourth grade and higher materials for teach-

ing inferential thinking, writing, vocabulary books and new literature books.

Para-professionals. Seven of the 12 interviewed teachers were assisted by para-professionals this year. Three of the seven teachers said that these para-professionals were excellently prepared and that their services were valuable. Four teachers expressed concern about the preparation of para-professionals with whom they worked. It should be noted that para-professionals are employees of decentralized programs and, as such, are hired, supervised and evaluated by community school districts' staff.

Para-professional staff when assigned by community school districts have, under the guidance of Title I teacher: worked with the selected pupils on a one-to-one or small group basis, specifically planned activities geared to foster skills as diagnosed and taught by Title I teacher; assisted with the preparation of materials; and assisted with the clerical and housekeeping tasks.

Pupil Selection. Teachers recommendations included more flexible guidelines for the selection of pupils into the program. For example: half of the teachers said a child cannot get help if he lives one block outside the prescribed area.

Coordination with the Regular Classroom Teacher. The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupils achievement and progress reports are reviewed with nonpublic school staff.

Teachers suggested that there should be even more conferences with the regular classroom teachers. It was also suggested that invitations should be extended to the Title I teachers to attend the nonpublic school faculty meetings.

It should be noted that constitutional limitations and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

Coordination with Title I Program Staff. Recommendations concerning coordination with other Title I Program staff focused on the desire to be scheduled in a school when other Title I teachers and/or the guidance counselor are there. Some teachers suggested that meetings be scheduled for all the Title I staff in a particular school.

Sixty-seven percent of the teachers offered praise for the program. This praise was unsolicited. Some teachers commented that the newsletter was very helpful; one said, "I've taken a lot of ideas from it." Some teachers indicated that the training was thorough and others reported that the training in writing in particular was helpful. The materials were also praised and several teachers commented favorably on the organization of the program.

IV. *CLASSROOM OBSERVATION SUMMARY*

Introduction

The classroom observations were made on the same day as the teacher interview at each of the 12 sites visited. Classroom observations varied in time from 45 minutes to 95 minutes. The mean observation time was 63 minutes. Five observations (42%) took place in the morning and seven (58%) took place in the afternoon. The earliest started at 8:45 a.m. and all observations were completed by 2:25 p.m.. The lessons observed lasted from 45 to 70 minutes. The class size varied from five students to 11 students: the grade level of the classes ranged from first grade holdovers to ninth graders.

Classroom Characteristics

Most of the classrooms were large, bright and airy. All of the 12 classrooms had adequate lighting and were

orderly. Ten classrooms were free from external noise; however, in one classroom, loud noise came intermittently from an elevator which opened directly into the room and, in another classroom, an elevated train periodically passes outside the window. All but one classroom had adequate space, ventilation, and flexibility. The exception was a room that was formerly a storage closet (approximately 8′ x 16′). It had no window; students had to stand up to allow others to move into their seats. There was limited space for materials; twice during the observation, boxes of materials fell from the place where they were balanced. All of these conditions interfered with the instruction in the classroom.

General Observations

All of the teachers devoted part of the time to whole group instruction and part of the time to individual work. This is in line with the teacher reports of activities in their classrooms. (See page 6 of this report.) Over half of the observed teachers included small group work in their lessons, 58%, and 42% of the teachers were observed allowing time for sustained silent reading.

No teacher was observed teaching phonetic or word analysis skills to the whole group although several worked with individuals on phonics. Sixty-seven percent of the teachers taught comprehension skills which required recalling details and the sequence of a story, finding the main idea, drawing inferences, and predicting outcomes. One teacher asked children to answer questions about a story. Seventy-five percent taught grammar or language arts lessons including nouns and verbs, comparatives, synonyms, new vocabulary, concrete vs. abstract words, collective nouns, categorization of words, and solving riddles. Eighty-three percent of the teachers integrated some writing activity in their lessons. Observed writing activities involving composition included: writing sentences using words from given lists, rewriting the last line of a poem, rewriting a story, com-

posing a party invitation, writing four sentences beginning with a certain phrase, and writing a description of chocolate candy. All of these observations were in keeping with the teachers' stated foci of instruction: to foster accurate comprehension, to develop and/or enrich language concepts, and to develop writing techniques.

Two teachers used microfiche machines, two used tape records, two used the Language Master and three used games to reinforce skills. At least one of the motivational techniques named in the Motivation Section under TEACHER METHODOLOGY of this report (page 7) was observed in use in all of the classrooms.

Table 5 lists the observed teacher activities. All of the observed teachers talked with the children about their activities, encouraged and reinforced children in their work and gave feedback to children on their progress. The evaluator observed that 92% of the teachers helped children solve academic problems and engaged in general discussions with the pupils.

Observation Checklist: Teacher

Eighty-three percent of the teachers were observed encouraging children to work independently, 83% were involved in pupil diagnosis and/or prescription and 83% held individual pupil conferences. The evaluator also observed 67% of the teachers encouraging children to work together, 42% working along with the children, and two teachers helping children solve social problems that arose. (See Table 5.)

Observation Checklist: Children

In all the classrooms children worked independently and in all but one, the children's work was visibly displayed in the classroom. In 50% of the classrooms, children worked in small groups independent of the teacher and in 17% of the classrooms children themselves were able to decide what they would do. No overt non-social behavior was observed in any of the classrooms.

TABLE 5

Classroom Observation Checklist: Teacher

Activities	% of Teachers Observed
Encourages children to work independently	83%
Encourages children to work together	67%
Talks with children about their activities for the instruction period	100%
Works along with children	42%
Helps children solve academic problems	92%
Helps children solve social problems	17%
Encouraging/reinforcing children in the work	100%
Gives feedback to children on their progress	100%
Pupil diagnosis/prescription	83%
General discussions with pupils(s)	92%
Individual pupil conference	83%

TABLE 6

Observation checklist: Children

Activities	% of classrooms Observed
Work independently	100%
Work in small groups independent of teacher	50%
Children decide what they will do (their plan is not limited to specific teacher conceived activities).	17%
Overt non-social behavior	0%
Children's work is visibly displayed in classroom	92%

V. *SUMMARY OF INTERVIEWS WITH PROGRAM COORDINATOR AND FIELD SUPERVISOR*

Introduction

The interviews with the program coordinator and the field supervisor revealed that these administrators were in close agreement with one another in the areas of theory and practice. The backgrounds of the two people in relation to the program are very different: The coordinator has been involved with the Nonpublic School Title I Corrective Reading Program since its inception fourteen years ago; the field supervisor has been working with the program for only five months. Their responses are reported together when the two agree; when they disagree, their responses are differentiated.

Program Considerations

Goals. The goals of the program are (1) to raise reading levels as measured by a standardized instrument, (2) to help develop an awareness and love of recreational reading, (3) to assist the pupils to function better in their classrooms, and (4) to prepare pupils in content areas. The goals were developed through the identification of pupils needs within the nonpublic schools and approved by the State Education Department. There is now a greater focus on comprehension and writing skills.

Strengths and Needs. The greatest strengths of the program were identified as the diagnostic-prescriptive approach, individualization, small groups in which the teacher can isolate weaknesses and build on strengths, the close relationships a teacher has with her pupils, and the opportunity to create an environment where children have successful experiences. Individualization is possible because the teachers meet with small groups of pupils and have many varied materials.

> The materials are selected for interest as well as readability. We try to develop within the child the responsibility of becoming responsible for his/own learning. To facilitate this we give him the opportunity to do the things he can't do in his own classroom, the use of the materials that are more interesting, and more stimulating and access to audio-visual machines.

When asked what parts of the instructional program are in need of strengthening, the program coordinator replied:

> We have a dearth of supervisors. The feedback to the teachers is not as good as it should be. We need additional field supervisors to provide on-site training and support.

The program coordinator also stated:

> I would guess the teachers are uncomfortable with teaching writing. They are good at teaching decoding; they can always use new ideas to teach comprehension. I would recommend greater concentration in developing writing skills and new and different approaches to teaching comprehension skills. More time to let children read in the classroom should be built into the program.

The program coordinator indicated she would also like to see more input by teachers into the development of the curriculum and the program; she indicated that this was an area that was presently being improved and where changes are planned.

Purpose of Program Assessment. Program assessments are primarily used for diagnosing individual and group needs. They are also used for planning and for program evaluation.

Instructional Considerations

Approaches to Instruction. A wide variety of approaches to instruction are utilized, but the primary approach is diagnostic-prescriptive.

A wide variety of materials are made available to teachers, including phonetic materials, linguistic materials, audio-visual equipment and materials, language experience materials, and materials for developing comprehension through a variety of approaches. Teachers are trained to select materials appropriate for a particular child, or group.

Daily Lesson. Each lesson should include large group, small group and individualized instruction. Within that framework there should be a language development lesson, a writing lesson and uninterrupted Sustained Silent Reading. Within each of these areas, the teacher may elect to teach a comprehension skill or a writing skill.

Motivation. Motivating methods and techniques are determined by the particular teacher. The coordinator stated, "We can suggest a multitude of techniques, but the teacher selects the particular technique that is motivating for each child." The supervisor, in addition, said that the students also realized "they're here to get help, and they try to get it."

Overlap between What is Taught and What is Tested. The field supervisor stated that there is considerable overlap between what is taught and what is tested in vocabulary, comprehension, and phonetic and structural analysis. She has observed this overlap on her site visits and by looking at plan books. She added that one area the Stanford Test does not evaluate is writing skills.

The program coordinator said that teachers do not teach specifically to the test; rather, they teach reading skills based on the diagnostic-prescriptive approach. She stated, "Of course, this will hopefully create growth and the pupils will hopefully perform better on the standardized tests." This has been the case, she stated, since the evaluations do indicate that pupils demonstrate

growth in reading. "But," she added, "our goals are larger than just achieving on standardized tests."

Introduction of New Ideas/Approaches/Topics. Within the last three years, there has been more focus on the total reading process, on the schema approach and on psycholinguistics. This year writing has been introduced both as a complement to teaching reading and as a goal in itself.

These ideas/approaches/topics were introduced to the teachers in large group conferences and/or small group meetings on days when the nonpublic schools were not in session. In addition, a monthly newsletter is published, resource materials are available to teachers in the office, and field supervisors make on-site visits to help teachers to become aware of and implement new ideas.

Student Considerations

Report of Students' Progress. Progress is reported to students through informal conferences that take place at least once every two weeks. The frequency of these conferences depends on the school, the teachers and the child. The tone of the conference is not formal but rather, "You mastered ————, now let's go on to ————."

Written progress reports are issued to the parents twice a year. In addition, parents are invited to the school to talk with the teachers. In some schools, parent workshops give parents an overview of what is being taught.

Communication between the teachers and the principals is encouraged. The principals must see and sign all the reports to the parents (issued twice a year). They also receive test scores for each group. In most schools the principals also have informal conferences with the Corrective Reading teachers.

Retention of Students. Student eligibility is determined by virtue of their residence in a target area and by the degree of their reading retardation. When students achieve grade level they leave the program. If they are not on grade level, they are retained. A classroom teacher

or principal may request that a child leave the program for any reason, but this is infrequent. "On the rare occasions when a parent requests a child's removal from the program, we comply," the coordinator said. At this point there is no limit to the number of years a student can remain in the program.

Personnel Considerations

Supervisory Staff Responsibilities. On-site visits provide the basis for teacher evaluations. The supervisor visits the classrooms and observes lessons. After each observation the supervisor makes suggestions, discusses any problems, and may demonstrate the use of new materials, or demonstrate a lesson. Formal observations are followed by a conference and then by a formal observation report which is maintained in each teacher's file.

Teachers are informally observed as frequently as possible. With new, inexperienced, and/or weak teachers, the observations were more frequent than with other teachers.

Observations of unsatisfactory teaching are followed by feedback to the teacher immediately after the lesson. The supervisor stated, "where we have a weak teacher, the frequency of visits is increased, the coordinator is made aware of it, oral and written suggestions are given to the teacher and follow-up observations are made by the supervisor.

The coordinator said, "Contacts among Title I teachers in various components are difficult because they are rarely in the same place at the same time. However, we have joint programs planned by the staff. We may invite the guidance counselor to a Corrective Reading Workshop, and a math and reading booklet was jointly published at Christmas."

The coordinator stated, "The supervisory staff meets with the coordinator at least once a month and makes the coordinator aware of particular needs. They are en-

couraged to go to conferences, select new materials and transmit new ideas to the staff in the field."

Strengths and Needs of Instructional Staff. According to the coordinator:

> The instructional staff's greatest strengths are their training and their years of experience teaching reading. Ninety percent are state certified reading teachers. Seventy-five percent have a master's degree in reading. A good percentage have been teaching corrective reading for years and have been teaching in this program for 14 years. They are sophisticated in teaching reading and knowledgeable about the populations they are teaching. We have a large number of teachers who really care.
>
> The area in greatest need of strengthening is the teaching of writing skills. The program will continue to provide in-service training necessary for professional growth. No one has yet come up with the magic answer for teaching reading, but we want to keep teachers updated, so they in turn will keep children wanting to come to the reading room.

Recommendations

General. The field supervisor expresesed the need for more supervisory personnel. (The coordinator had also previously indicated that this was a need of the program.)

The coordinator indicated that she would like to see growth in the parent-tutoring and peer-tutoring programs, both of which have had favorable evaluations. In addition, she would like to see more teacher input into staff development through needs assessment, teacher presentations at staff conferences, and more opportunity to bring in top consultants in reading and writing.

Staff Development. Recommendations for staff development included (1) more opportunities for sharing of

techniques that are working in the program, (2) greater opportunities for intervisitations, and (3) enough supervisory staff to follow through with a particular teacher on training which has been initiated.

Materials. With reference to materials, the coordinator is constantly reviewing new products. She would like to field test new materials by buying small quantities for pilot basis use and evaluation before disseminating the materials to the entire staff.

Para-professional Services. Para-professional are hired by the districts. "It would help if we could hire them or if we had some clarification about their training. Are we responsible for the para-professionals and if so, in what manner? If the district is responsible, it would help to have some interchange."

Coordination with Regular Classroom Teacher. One recommendation concerning coordination with the regular classroom teachers is that there be increased articulation between the non-public schools classroom teachers and the Title I staff, particularly regarding pupil needs. Although there is informal contact, some type of structure to increase the communication between the ESL teacher and the regular classroom teacher should be studied within the constraints of the present regulations.

VI. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

Conclusions

The Corrective Reading Program offers its teachers a wide variety of techniques and approaches to teaching reading. Teachers are free to select the techniques best suited for their students (and their teaching style) within the framework of a diagnostic prescriptive approach to teaching reading.

During the interviews, 67% of the teachers offered unsolicited praise for the program. Teachers also expressed satisfaction with the instructional materials they received

and with the organization of the program. Overall, the staff appeared enthusiastic about the program. Furthermore, the test data indicates that pupils made significant gains in reading achievement, during the course of the year. It should also be noted that the classroom observations made by the evaluation consultant were in accord with the teachers stated foci of instruction.

Recommendations

An administrative practice worthy of praise is the manner in which instructional materials are selected for use. The materials are piloted on a sample of teachers to obtain their feedback before the material is considered for distribution system wide. We suggest that this practice be adopted in the other Title I Nonpublic School Program components.

The major addition to the Corrective Reading Program this year was the state mandated writing program. Ninety-two percent of the surveyed teachers indicated that they had observed improvement in student writing ability—i.e., ability to write in longer units, growth in sentence sense, and improved self-expression. We recommend that the program continue to implement the successful practices begun this year. Through the collecting of information about the writing program from teachers and the program coordinator, the evaluation team was able to learn about the communication between the staff and program coordinator. It is noteworthy that the coordinator's perceptions of the teachers needs, related to teaching writing, matched the teachers own stated needs. One issue which should be assessed next year is the impact of the writing program on reading achievement.

Finally, the evaluation team recommends that the impact of the reading readiness program should be assessed, along with the program's staff development activities.

DEFENDANTS' SUPPLEMENTAL EXHIBIT C

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title I

Project Identification Number: 5001-64-01623

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAMS
READING SKILLS SERVICES
1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools Reading Skills Program, hereafter called, the Reading Skills Program, served 431 nonpublic school students in grades 4-8 at nine sites; the students are Title I eligible, have severe reading problems, and need one-to-one instruction.* The program's goal is to provide individualized diagnostic-prescriptive reading and writing skills instruction for severely disabled readers. Students demonstrate, through mastery on criterion-referenced tests, their reading proficiency in the areas of word study, vocabulary, comprehension and study skills.

Depending on the severity of the reading problem, students meet with the Reading Skills teacher three to five times per week from 45 to 60 minute sessions. This instruction continues until the student is able to function adequately in the regular nonpublic school classroom and has no further need for supplemental instruction.

The staff included one full time (FTE)** coordinator, 17 FTE teachers, and one FTE secretary. Each teacher provides a minimum of four hours of instruction per day. In addition, a one hour conference period was set up each day to be used by teachers to meet with parents, communicate with nonpublic school personnel, and to diagnose individual pupil needs.

The purpose of this evaluation report is to report student achievement data, describe program implementation from the teachers' and coordinators' perspectives, and to

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* Students are ineligible if they are non-English speaking, receive the services of the Title I Corrective Reading Program or the services of the Title I English as a Second Language Program or are enrolled in a District Reading Program.

** FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis, therefore, the amount of teach-in service is expressed in FTE's in lieu of reporting the number of teachers employed.

indicate directions for a more in depth evaluation during the 1980-81 year.

II. *DATA ANALYSIS*

Objectives

The objective of this program was that students were to achieve gains in performance in reading comprehension greater than would have been expected in the absence of treatment. Reading comprehension was measured by performance on the comprehension subtest of the Stanford Diagnostic Reading Test, 1976 edition.

USOE Evaluation Model A1 was used to derive the "no-treatment expectation". Pretest raw scores were converted to Normal Curve Equivalents (a type of score which expresses performance in relation to the performance of a nationally representative group of students), NCE's. Posttest scores were also converted to NCE's. It was assumed that, in the absence of treatment, the mean NCE of the group would be the same at posttest as at pretest.

An increase in mean NCE's was interpreted as a gain in performance beyond what would have been expected without treatment.

Grade 4 students were tested on the comprehension subtest of the Standford Diagnostic Reading Test, Form B, Green level. Grades 5-8 were tested on the Brown level of the same test.

Summary and Analysis of Results

Of the 431 students reported as program participants, valid pretest and posttest data were submitted for 422 students. The program results are positive (refer to Chart I). On the average, students in Grades 4 through 8 gained 11 NCE's, with a range from 9 to 12 NCE's. In all four grades, students' average performance at posttest was between NCE 34 and NCE 40. These scores are

approximately equal to a percentile ranking of 22 and 32, respectively. The pretest NCE means range from 23 to 29, or from the 10th to the 16th percentile. Thus, these students have made major gains during their year in the Reading Skills Center.

Correlated t-tests were performed on all raw scores and NCE's for each grade level. All gains were statistically significant beyond the .001 level.

CHART I.

READING COMPREHENSION SCORES FOR STUDENTS IN SKILLS CENTERS, GRADES 4-8

		Raw Scores		NCE's		Mean Gain in NCE's
		Pre	Post	Pre	Post	
Grade 4	Mean	30	43	26	37	11
N = 44	Median	31	46	27	37	
Grade 5	Mean	15	24	24	36	12
N = 89	Median	15	24	27	38	
Grade 6	Mean	17	28	23	34	11
N = 90	Median	17	28	26	36	
Grade 7	Mean	23	35	26	35	9
N = 105	Median	22	36	29	36	
Grade 8	Mean	31	40	29	40	11
N = 94	Median	33	42	30	40	

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Introduction

Data for the responses were collected from 16 teachers who completed the survey at a group meeting at the end of the school year. The survey was constructed based on results from the teacher interviews pretested and revised by the Office of Educational Evaluation with assistance from the central Title I Nonpublic School Program administrators.

Data from the interviews were collected in three schools over the period from May 29, 1980 to June 10, 1980. Each site visit included observing the Title I reading skills class and interviewing the teacher. A total of four reading skills teachers were observed and interviewed; two reading teachers were interviewed at one site because there was ample time to complete both interviews. This was not the case at the other sites; at these sites, the teacher whose last name was closest to "Z" was interviewed. The sites for the evaluation were selected randomly from a stratified sample of schools in the Title I Nonpublic School Reading Skills Program.

The interview form was constructed, pretested, and revised by the Office of Educational Evaluation with assistance from the Central Title I Nonpublic School Program administrators. The interviewer was trained in the use of the form before the interviews began. Teachers being interviewed were informed of the purpose of the interview: to feed information back to the program coordinator for administrative and evaluative purposes. The teachers were assured of complete confidentiality, and their responses are all reported anonymously. Each interview took between 45 and 50 minutes. The mean interview time was 48 minutes.

Given the fact that the number of interviewed teachers was small (N=4), data percentages will not be noted and the narrative statements will tend to be brief.

Information About Teacher Respondents

Teaching Experience. The survey data indicated that 13% of the 17 teachers had total teaching experience of one to five years, 44% had six to ten years, 31% had 11 to 15 years, 6% had 16 to 20 years and 6% had more than 20 years of teaching experience.

All four of the interviewed teachers had over five years of teaching experience; two had taught six to ten years, one had taught 11 to 15 years and one had over twenty years of experience.

Teaching Experience In Title I Nonpublic School Program. Experience in the Title I Nonpublic School Program for teachers responding to the survey was 13%, one year, 0%, two years, 19%, three years, 25%, four years, 44%, more than five years. Of the interviewed teachers, two teachers had four years experience in the Title I Nonpublic School Program and two teachers had five years experience in the program.

Educational Background. All survey respondents indicated that they had an MA/S degree. All four interviewed teachers had an MA/S degree; two had 30 credits over the masters degree.

Professional Development and Activities. Over the past three years, 81% of those responding to the survey had earned college credits, 31% attended non-Title I Board of Education workshops, 19% took United Federation of Teachers' courses, 81% participated in Title I workshops, 69% attended local and national professional conferences, 63% participated in publisher's materials workshops and 25% took other non-credit courses.

During the three years, one interviewed teacher had taken coures for college credits, two are International Reading Association members and all four teachers have attended workshops and/or in-service programs.

Pupil Profile

Number of Students Taught. The average number of pupils taught by the survey respondents was approximately 27. Each of the four teachers interviewed had a total of 25 students at all sites.

Criteria for Selection. All teachers indicated that children who were severely disabled readers were eligible for the program and three teachers identified low achievers in reading as also being eligible. Also mentioned as criteria of selection for the children in reading skills classes were Science Research Associates test scores (SRA) and Metropolitan Achievement test scores (MAT). All interviewed teachers indicated that a student must meet the nonpublic school Title I guidelines.

Participants in Selection. All of the surveyed teachers reported that the Title I teacher participated in the selection of the children for the program. Other responses were nonpublic school principal, 81%; nonpublic school classroom teacher, 63%; Title I guidance counselor, 50%; and other Title I teachers, 69%.

The interviewed teachers reported that people participating in the student selection were Title I teachers (4),* the nonpublic school principal (3), classroom teachers (2), Title I corrective reading teacher (2) and the Title I guidance counselor (1).

Most Common Learning Problems. On the survey, teachers were given a list of eight learning problems and asked to identify the three most common to the students they taught. Percentages of teacher responses were as follows: 13%, problems from other achievement areas; 31%, attention problems; 50%, language problems; 6%, behavioral problems; 44%, poor listening skills; 31%, poor self-image (including fear of failure); 63%, retention skills; and 56%, general problems in concept formation.

Interviewed teachers mentioned a wide variety of learning problems. Most frequently reported were poor comprehension, short attention span, limited language development, and limited language experience (children from Spanish-speaking families). (See Table 1, page 9, for a listing of the teachers' responses.)

Teaching Methodology

Major Areas of Focus. Teachers were asked to indicate on the survey the major areas of focus of their instruction: 94%, diagnostic-prescriptive reading; 94%, diagnostic-prescriptive writing; 94%, comprehension; 81%, work attack skills; 81%, decoding; 75%, sentence structure; 69%, word power; 63%, work-study skills; and 56%, paragraph structure.

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* Numbers in parenthesis indicate the number of respondents selecting or giving a particular response.

All interviewed teachers indicated the following areas of focus for instruction: word attack skills, decoding, word power, comprehension, work and study skills, sentence structure, diagnostic-prescriptive reading and diagnostic-prescriptive writing. Also, three of the four teachers indicated that paragraph structure was an area of focus. Other areas of focus identified were: reading in content areas, punctuation, and vocabulary.

TABLE I

LEARNING PROBLEMS AS REPORTED BY TEACHER INTERVIEWEES (N = 4)

Problems	Number of Responses
Poor comprehension	2
Short attention span	2
Limited language development	2
Limited language experience (children from Spanish speaking families)	2
Low self-esteem	1
Poor background in phonics	1
Low confidence in reading ability	1
Limited experiential background	1
Poor concept vocabulary	1
Difficulty in differentiating sounds	1
Poor visual memory	1
Poor word attack skills	1
Poor socio-economic background	1
Emotional problems	1
Physical problems—need glasses	1
Poor sequential output of skills	1

Time Allocation. The amount of time spent on different instructional groupings was consistent across teachers. Three teachers said they spent 75%-85% of their time on individual instruction. All teachers responding indicated that time was spent on diagnosis, but this was an on-going process associated with the individualized in-

struction. Although all three teachers indicated that they did spend time in whole group instruction, this never exceeded 25% of the total teaching time.

Motivation. The survey asked teachers to indicate the methods or techniques they used to motivate students; they responded: 93.8%, graphs for self-tracking; 81.2%, reward systems (stars, stamps, etc.); 81.2%, other pupil self-evaluation techniques; 25%, games; 25%, other manipulatives. Teachers in the survey were asked to indicate the behavioral changes they were aware of as a result of the increased motivation. These were: know what to do without asking 63%; willing to try more difficult materials, 50%; more pupil participation in Title I classroom activities, 50%; better self-image, 38%; greater rapport with teachers 19%; and more attentive, 13%.

Three of the four interviewed teachers identified machines (A-V equipment, cassettes, etc.) as a motivating tool they used. Two of the interviewed teachers also indicated that they use high interest materials (e.g., NFL baseball reading kits) and try to focus in on the child's interests and experiences. Other specific motivational techniques mentioned by one teacher each included: motivating the child through the teacher's own interests, creating anticipation to stimulate the child's interest and encouraging the pupil to follow-up on their own, low pupil-teacher ratio, graphing student progress (self-competition) and "breaking the code" in the High Intensity Learning System (HILS) Program.

Interviewed teachers commented that as a result of increased motivation, they have noted the children are more outgoing (2), more verbally communicative (2), more willing to try difficult materials (2), reading to each other and themselves more frequently (1), learning to follow directions (1), aware of what to do without asking (1), and feeling independent because they have a "job" (1).

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* One teacher would not respond to this question indicating the program was individualized.

Peer Tutoring, Independent Study, and Individualized Instruction. Sixty-three percent of the teachers responding to the survey reported that their students were involved in peer tutoring. Sixty-nine percent reported that their students were involved in independent study activities.

During the interviews, three teachers indicated that their students were involved in peer tutoring. This took the form of older children helping younger children or a child, who had finished early, proof-reading another child's work. All of the teachers interviewed reported that their students participated in self-evaluation and three teachers stated that their students did independent study.

*Writing Skills, Survey Results.** All of the teachers responded that they use the writing of a journal in connection with teaching writing. Fifty percent indicated that the journal writing had been extremely effective for the diagnosis of writing skills as compared to using a diagnostic tool. Other responses were very effective, 38%; and somewhat effective, 13%. Teachers were given three areas of growth and asked if they could detect any growth in the students' writing from the review of the pupil journals: 100% indicated growth in ability to express oneself, 100% reported growth in the ability to write in longer units and 94% reported growth in sentence sense.

Writing Skills, Interview Results. Each of three teachers, responding to a question on improvement,** indicated pupil improvement in different areas: "vocabulary, spelling and word usage improvement and a better understanding of the main idea when they were taught paragraph structure"; "when children write their own work, they are able to read it"; and, "children realize that writ-

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* In appendix are Writing Skills Guidelines, Writing Skills Diagnostic Profile Sheets and Writing Skills Scope and Sequence of Program.

** Evaluator omitted this question from one interview.

ing is talking written down and that it is a real method of communication."

All interviewed teachers had a different preference for a weekly time schedule for teaching writing. One teacher had no preference. One teacher indicated that she would like to teach writing everyday for the first ten minutes of the class period. Another preferred to teach it one day a week as a group lesson and the fourth teacher indicated her preference was to teach writing twice a week during the 60-minute classes.

Journal writing was used by all four teachers in connection with teaching writing. Teachers indicated that the journal writing had not only been an effective diagnostic tool but had also been effective in teaching punctuation, sentence expansion and usage.

All teachers indicated that their students had grown in sentence sense, the ability to express themselves effectively and the ability to write in longer units. Two teachers reported that the students have gone from writing sentences to writing stories and compositions.

Pupil Assessment

The following table summarizes the teachers' responses on the survey to pupil assessment methods.

TABLE 2

PERCENT OF TEACHERS USING VARIOUS ASSESSMENTS AT THE BEGINNING OF THE YEAR AND DURING THE YEAR

Method	Used at Beginning	Used During Year
1. Nonpublic School Program Assessment	50%	44%
2. An Informal Reading Test	56%	63%
3. A Standardized Norm Referenced Test	75%	44%
4. Teacher Made Criterion-Referenced Test (CRT)	38%	56%
5. A Commercially Made CRT	100%	100%
6. Conference with Classroom Teacher	63%	69%
7. Classroom Observation	0%	63%

Teachers were asked to check on the survey the two major purposes for which they used the results of the initial pupil assessment: 100%, to individualize instruction; 63%, for diagnosis; 13%, to evaluate progress; 13%, for lesson plans; and 13%, to teach pupils self-evaluation.

All teachers used the Stanford Diagnostic Test for assessment at the beginning of the year. Two teachers also used SRA or MAT scores, two teachers used the Random House High Intensity Learning System and one used informal observation check-in lists for initial assessment.

The initial pupil assessment was used by all teachers to individualize instruction and to fulfill Title I program requirements. Other purposes of the initial assessment reported were: to plan long-range lessons (3), to evaluate progress (2), to organize group work (1), to diagnose (1) and to plan short-term lessons (1).

The Random House High Intensity Learning System check-in and check-out tests were administered by all teachers to reassess the students' progress during the year. The frequency of this testing ranged from every two to three days to once a month depending on the skill and on the individual child. Three of the four teachers also indicated that they reassess students through daily observations. One teacher conducts (approximately ten times a year) book conferences with children to discuss the books each child has read.

Pupil re-assessments were used by all interviewed teachers to evaluate progress and to individualize instruction (3), to help the child to become a stronger balanced reader (2), to organize group work (1), to plan long-range lessons (1), and to plan short-range lessons (1).

Students Records. For each child, all four interviewed teachers kept records of: the student's diagnostic assessment of reading and writing needs; specific instructional objectives in word study, vocabulary, comprehension and study skills; prescribed reading and writing objectives; student mastery of objectives; daily attendance; and

standardized and criterion-referenced tests. Additional records kept by teachers included lesson plans (in a plan book); a daily log noting conferences and pupil work/problems; and folders on students' progress from past years.

Related Duties. Interviewed teachers were asked to specify their duties related to teaching. All teachers reported that they selected pupils, administered tests, defined short- and long-range objectives, individualized lesson plans, evaluated pupil progress, scheduled pupils for instruction, met with parents, made clinical/guidance referrals and discussed pupil status with other Title I staff. Two teachers indicated that they directed the activities of the para-professional.

Materials Used. All of the interviewed teachers indicated that the materials they have in their classrooms are appropriate for the pupils they teach. In addition, all responded that the materials in their classrooms are helpful to them in the manner in which they teach. Selection of materials was identified by all four teachers as being provided by the Title I central staff; two teachers indicated that the Title I teacher helped to select materials.

Support Services

Clinical and Guidance. The results of the survey item asking teachers to specify all those who refer pupils to clinical and guidance services were: 100%, Title I teachers; 69%, nonpublic school principal; 88%, other Title I teachers; 94%, nonpublic school classroom teacher and 13%, parents. These Title I clinical and guidance services were rated extremely effective by 25% of the teachers surveyed, 25% rated the services very effective, and 50% rated the services as somewhat effective.

The interviewed teachers indicated that the Title I teachers refer students to the clinical and guidance services. The regular classroom teacher also can refer student (1). All of the interviewed teachers found these services to be effective.

Nonpublic School Principal. Teachers answering the survey indicated they receive support from the public school principal through orientations to school procedures, 81%; scheduling, 69%; arranging conferences with the regular nonpublic school classroom teachers, 44% and monthly conferences, 19%.

All of the interviewed teachers indicated that the principal of their school encourages coordination with regular classroom teachers, provides orientation to school procedures, and makes scheduling decisions. Three interviewed teachers noted that they received support from their principals in the following ways: the principal's attendance at the monthly conferences, the principal's respects for the program, and the principal's assistance in gaining the cooperation of parents, students, and teachers.

Title I Central Staff. On the survey, 94% of the teachers stated that the Title I central staff provided training/orientation; 88%, supervisory visits; 81%, demonstration of instructional methods; 81%, resource materials; 69%, teacher evaluation of suggested techniques; 63%, follow-up conference notes; 44%, assistance in testing/diagnosis; and 38% assistance in pupil selection.

All four interviewed teachers identified the following as support services they had received from the Title I central staff: training and orientation, demonstration of instructional methods, resource materials, follow-up conference notes, evaluation of suggested teaching techniques, and supervisory visits. Other support services provided were: assistance in testing and diagnosis (2), assistance in pupil selection (1), guidance services and psychologists (1), and accessibility for phone contact (1).

Parent Contact

Number and Frequency. The survey reveals that the teachers meet an average of 40.4% of the parents. Thirty percent of the teachers reported seeing parents on

a continuous basis, either weekly or monthly; 65.1% saw parents every reporting period; and 88.9% indicated they met with parents on a yearly basis.

Results of the interviews revealed that the number of parents met at each site ranged from six to 14. The mean number of parents met was 11.* Two teachers see some parents daily, one teacher sees some parents weekly and all teachers see some parents every reporting period.

Method. Contacts with parents reported by teachers responding to the survey were face-to-face (80.5%), by telephone (29.7%), by written communication (100%) and in parent/tutorial workshops (80.3%).

Most of the communication between parents and interviewed teachers was face-to-face. Two teachers used the phone as a means of communication and all used written communication (which include the Progress Reports which are issued twice a year).

Initiation. On the survey, 100% of the teachers indicated that they initiated the majority of teacher-parent contacts.

One of the interviewed teachers indicated that initial contact is made by the Title I teacher and the other three indicated that the parents had made their initial contact.

Classroom and Home Involvement. Parental involvement in the classroom is reported by interviewed teachers to be primarily through individual conferences to discuss their child's progress. Two teachers indicated that parents came to observe; two indicated workshops had been held for parents, and one teacher indicated that parents were involved in tutoring.

Interviewed teachers indicated that at home the parents discussed books with their children; parents have asked teachers for books to take home and read with

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* More parent contact is being provided for the students than this figure indicates; in some instances the para-professionals meet parents with the teacher present.

their children; and parents watched the television news with their children.

Major Concern of Parents. All teachers responding to the survey reported that the parents' major concern was that their children approach grade level academic performance.

Interviewed teachers report the major concerns of the parents to be: reading score improvement (2), children watch too much television (1), acceptance of the child to a good high school (1), and ways in which parents can help at home (1).

Recommendations

Survey Results. On the survey, teachers were given seven recommendations and asked to indicate which was most important for the improvement of the Title I program. The responses were:

44%—No significant improvement is required.

19%—More Title I teacher involvement in materials selection.

19%—More opportunity for coordination with the nonpublic classroom teachers.

13%—More workshops based Title I teacher input (re: teaching techniques).

6%—Fewer students seen more often.

General. Overall, morale of the Reading Skills teachers was very high. The reading teachers felt that the program was well suited for the children they taught.

Two teachers had concern about the child's removal from the regular classroom while he/she is in the Title I class; the child misses work being done in the regular classroom. One teacher felt more interaction between the Title I teacher and the regular teacher would alleviate some of the problems this presents. The other teacher recommended that the child be removed from only

one content area allowing the Title I teacher to reinforce the subject manner the child was missing.

Another teacher indicated that she would like machines—specifically additional tape recorders and a rexograph machine.

Other recommendations were:

Materials. One teacher recommended more library books because a certain percentage are lost each year.

Coordination with Regular Classroom Teacher. The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff. However, one teacher indicated more communication was needed. It should be noted that Constitutional limitations and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

IV. *CLASSROOM OBSERVATION SUMMARY*

Introduction

Three sites of the nine sites were visited. Classroom observations varied in time from 30 minutes to 60 minutes. All three observations took place in the morning; the earliest started at 9:45 A.M. and all observations were completed by 12:30 P.M.

Classroom Characteristics

All three classrooms were adequate with regards to lighting, orderliness, space, ventilation, freedom from external noise, and flexibility.

General Observations

Individualized instruction was observed in all classrooms. Also, children were assigned individual, small

group or whole group tasks. The teacher would then circulate and help students. The High Intensity Learning System Program was observed being used in all classrooms. Small group work was observed in two of the classrooms.

Observation Checklist: Teacher

All of the teachers were observed working along with the children; helping children to solve academic problems; encouraging and reinforcing children in their work; giving feedback to children on their progress; and providing individual pupil conferences. Teachers were also observed talking with children about their activities for the instruction period, having general discussions with the pupils, encouraging the children to work independently, and encouraging the children to work together.

TABLE 3

CLASSROOM OBSERVATION CHECKLIST: TEACHER
(Number of Classrooms = 3)

Activities	Number of Teachers Observed
Encourages children to work independently	1
Encourages children to work together	1
Talks with children about their activities for the instruction period	2
Works along with children	3
Encourages/reinforces children in their work	3
Gives feedback to children on their progress	3
Pupil diagnosis/prescription	0
General discussions with pupil(s)	2
Individual pupil conference	3

Observation Checklist: Children

In all classrooms children were observed working independently. Children's work was visibly displayed in all classrooms. There was no overt anti-social behavior observed.

TABLE 4

CLASSROOM OBSERVATION CHECKLIST: CHILDREN
(Number of Classrooms = 3)

Activities	Number of Classrooms Observed
Work independently	3
Work in small groups independent of teacher	0
Overt anti-social behavior	0
Children's work is visibly displayed in classroom	3

V. *SUMMARY OF INTERVIEW WITH PROGRAM COORDINATOR*

Introduction

The Program Coordinator has been involved with Title I programs in reading since 1968—three and a half years as a corrective reading teacher, seven years as corrective reading supervisor and one year as the Reading Skills Program Coordinator. The interview with the program coordinator lasted one hour, 50 minutes.

Program Considerations

Goals. The Program Coordinator specified several educational goals and philosophic orientations: (1) to identify and remediate student techniques include teacher-made and commercial materials; (2) to establish rapport between the teachers and pupils; she stressed that this rapport is essential before learning can take place; (3) to establish a non-threatening environment for the students and create an atmosphere of trust; (4) to create a democratic classroom where children are a part of the teaching-learning process; and, (5) to engage children in the learning process so that the children will understand their own needs, know why they are there, what they are doing, and be part of the evaluation process.

These goals were developed by assessing the needs of the target population through diagnostic and standardized test results, results from previous evaluations, current research in learning methodologies, exploration of newer materials on the commercial market and input from reading skills teachers via their pupil evaluations.

The goals have changed since the beginning of the program largely as a result of changes in State mandates. This year the State-mandated writing program was instituted. New teaching methodologies were employed, along with the purchase of new materials to foster the development of the writing program. Other changes in the program included increased teacher participation in materials selection* and more encouragement of parental cooperation.

Strengths and Needs. The program coordinator indicated several strengths of the program. The first one she mentioned was the individual diagnostic-prescriptive approach coupled with the small teacher-pupil ratio. This approach is possible because of the variety of materials in all skill areas, and the effective classroom management system (criterion-referenced testing, mastery learning and others). The instructional staff was aided by inter-visitations, conferences, demonstration lessons, observations, and staff training bulletins. In addition, the small supervisor-staff ratio encourages flexibility. It was also noted that the supervisor has a car which makes it easier to meet with the program's teachers. The coordinator also indicated that there was cooperation and support from the Title I Director and Assistant Director and open channels of communication with other Board of Education agencies.

To strengthen the program, the Coordinator suggested continued work in developing oral language facility and furthering concept development. In addition, she sug-

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* See Appendix for a copy of the evaluation form used by teachers to assess materials they used in classroom.

gested continued teacher training in the areas of writing skills and awareness of pupil's needs. Changes anticipated or planned include introducing professional literature, follow-up work on sentence combining and sentence expansion and a continued focus on the writing skills program in the form of continued research, use of the teacher-made materials, and purchase of more commercially-made materials.

Purpose of Program Assessment. Program assessments were used to determine the degree to which the specific reading and writing skill objectives were attained by the individual pupils, to further identify the needs of the target population, to develop the curriculum and incorporate necessary changes, to assess materials (and thus influence what materials to purchase), and to evaluate teacher training.

Instructional Considerations

Approaches to Instruction. Within the individualized diagnostic-prescriptive approach, a wide variety of methods to teach reading and writing were utilized. The students are grouped together for instructional purposes—to be paired with tutors or to form small groups based on pupil interests. Teachers used a variety of materials to explain and refine a skill—bulletin boards, demonstrations, reference materials and the like. Other methods used were language experience, direct instruction, phonics, and emphasis on the task analysis of the skills.

Daily Lesson. General components of the daily lesson should include journal writing, sustained reading, one-to-one diagnosis of pupils needs, direct skill instruction, mastery testing, and some type of reinforcement activity to remediate specific weaknesses using commercially prepared materials.

Motivation. The Program Coordinator indicated that motivation must be directly related to the objective and aims to tap the needs, interests, and abilities of the student. Specific techniques included questioning strategies,

using the child's experiential background; the use of pictures, diagrams and physical representations; discussions, demonstrations and explanations; audio-visual materials (machines, cassettes and other); and reading stories aloud.

Overlap Between What is Taught and What is Tested. The program coordinator stated that there is an overlap between what is taught and what is tested. The program has specific objectives outlined in the materials and the mastery tests are directly related to the attainment of these objectives. Further, the analysis of the journal writing is directly related to the instructional program. This overlap is indicated by the high correlation between the needs of the students (indicated by the standardized tests) and the skills the coordinator observed being taught in the classrooms.

Introduction of New Ideas/Approaches/Topics. Because this was the program coordinator's first year, she was only able to speak of the changes implemented this year. The writing program was initiated this year using the individualized prescriptive approach focusing on the skills and techniques of sentence combining, sentence expansion and diagnostic profiles on writing skills. Teachers were encouraged to implement an oral and listening vocabulary development program using the pupil's experiential background and to develop oral communication skills (as a prerequisite to writing skills).

These ideas/approaches/topics were introduced to the teachers in staff training sessions using the following techniques: demonstration lessons; workshops; staff bulletins (as follow-ups to the demonstration lessons and workshops); presentation of current research to the teachers at conferences; and disseminating information about local reading councils, fairs, and exhibits. In addition, teachers were observed (informally and formally) to see if various ideas/approaches/topics had been used in the classroom. If the coordinator observed the teacher using skills, materials or ideas in the classroom that had

been previously demonstrated, a note of praise was sent to the teacher after the field visit stating the specific skill that had been implemented.

Student Considerations

Reporting a Student's Progress. The student gets feedback on his progress in a number of ways. The High Intensity Learning System program includes check-in/check-out tests which are used regularly (daily to weekly depending on the need). Wall charts are used daily. Pupil-teacher conferences also provide the student with an evaluation of his/her progress. Students also see their progress reports which are issued twice a year.

Written progress reports are issued to the parents twice a year. The teachers are also available for individual and group conferences. The frequency of these conferences varies with the need of the child and the availability of the parents.

The principals are given special reporting forms which indicate the results of the posttesting. There is also ongoing communication between the teachers and the school principals as needed. Nonpublic school classroom teachers are also provided with Pupil Profile Reports indicating strengths and weaknesses in skill areas.

Retention of Students. The guidelines for selecting a student are built into the program. A child can stay until he/she reaches grade level at which time they leave the program. There is no limit to the number of years a student can remain in the program.

Personnel Considerations

Coordinator's Responsibilities. Formal observations are employed to evaluate teachers. The teachers are assessed by observing to what degree they have implemented the guidelines and approaches/ideas/topics introduced to them in workshops, conferences, staff bulletins and the like. Teachers are formally evaluated once a

year. There are also unannounced site visits. If a teacher's performance is observed to be unsatisfactory, the program coordinator would plan teacher training sessions, discuss the situation with the Program Director and follow the established Board of Education procedures, if necessary.

The program coordinator reported that she meets the responsibility of relating to other Title I coordinators through on-going communication with the coordinators of other Title I services. There is informal communication regarding materials, methodologies, staff training programs, specific pupil needs, scheduling and the like. Title I Clinical and Guidance Program sends to the coordinators pertinent data monthly.

Program change and the development of staff are the result of: attending conventions, conferences, and training sessions; following current research; reviewing new materials; developing staff training programs; and communicating with other Board of Education divisions.

Strengths and Needs of Instructional Staff. The Program Coordinator indicated that the greatest strengths of the instructional staff were their diagnostic techniques, evaluation techniques (check-in and check-out mastery testing), methods of reporting data (pupil record keeping), and communicating with the other supportive Title I services staff and the classroom teacher in the nonpublic school.

Recommendations

The Program Coordinator's recommendations were related to staff development activities:

—The instructional staff should be strengthened in the use of tools for evaluation in the writing skills component.

—Teachers should assist pupils in developing language facility, especially oral and listening vocabulary.

—Teachers should be given additional instruction in the primary scoring, interpretation, and use of the California Achievement Test data. (The program will be using the CAT for the first time next year in place of the Stanford Diagnostic Reading Test.)

VI. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

Conclusions

Students in the Reading Skills Center showed significant improvement in reading achievement as measured by the Stanford Diagnostic Reading Test. On the average, students who took both the pretest and posttest gained 11 NCE's. Given that the State Education Department has set the gain of 1 NCE as the minimum criterion for programs to demonstrate significant educational impact, it can be concluded that pupils in this program have made substantial improvement in reading ability during the course of this year.

Observations and interviews revealed the following information related to program implementation. In all classrooms, children were observed working independently and student work was visibily displayed. Teachers expressed satisfaction with the instructional materials they had received and the staff training provided by the program coordinator. Overall, morale was high; both teachers and the program coordinator were pleased to be working in the program. These statements are supported by the fact that 44% of the surveyed teachers felt that the program needed no significant improvement.

Furthermore, communication between the teachers and the program coordinator was excellent. The coordinator's perceptions of the instructional needs of students were in accordance with teacher preceptions. Specifically, 50% of the teachers identified language problems as one of the three most common learning problems of students

they taught; 44% identified poor listening skills as a major learning problem. The coordinator showed awareness of student problems in these areas in her recommendation that teacher training sessions be devoted to developing oral language facility.

Recommendations

Since the writing component and the development of oral vocabulary and listening skills were new features to the program this year, the evaluation team supports the coordinator's recommendations that: (1) staff development in these areas be continued, and (2) the implementation of these components be monitored.

Since the journal writing technique was identified by teachers as an effective tool in the teaching of writing, especially punctuation, sentence use, and sentence expansion, it is recommended that this technique be continued. Methods should be developed to evaluate the pupils' journal writing; and the impact of the writing program on reading achievement should be assessed.

DEFENDANTS' SUPPLEMENTAL EXHIBIT D

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title I

Project Identification Number: 5001-64-01625

ESEA TITLE I

NONPUBLIC SCHOOL PROGRAMS
ENGLISH AS A SECOND LANGUAGE

1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools English as a Second Language Program, also referred to as the ESL Program, served 3,360 nonpublic school students in grades K-8 at 86 sites. All the students, were Title I eligible and exhibited deficiencies in the use of English language skills in the areas of listening, speaking, reading, and writing. Student language development was measured by an analysis of their scores on standardized pre- and post-tests. The major component of the program was small group instruction (maximum of ten pupils) with a licensed ESL teacher. These groups met two to five times per week for a maximum of 60 minutes per session, depending on the severity of the language deficit.

The project funded salaries for teachers, supervisors, and administrative staff. The staff included one coordinator, one field supervisor, 51.4 full-time equivalent (FTE)* teachers, and two FTE secretaries. The funds for teaching materials (language games, textbooks, workbooks, pictures, and posters) and audio-visual resources (tape-recorders, film-strips, language master machines, records, and tapes) were also provided by the program.

II. *DATA ANALYSIS*

Objectives And Tests Used

Students were to improve in auditory skills as measured by their performance on the language subtest of the 1978 Test of Basic Experience (TOBE), level K for kindergarten and level L for grade 1; and their performance on the Total Auditory subtest of the 1973 Stanford Achievement Test (SAT), Primary I, Form A, for grades 2-8.

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* FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis; therefore, the amount of teaching service is expressed in FTE's in lieu of reporting the number of teachers employed.

Report And Analysis Of Evaluation Results

Standardized tests: The program served 3,360 pupils according to records. Data were submitted for approximately 3,333 pupils. Valid pre- and posttest data on the TOBE or the SAT Auditory were obtained for 3,077 students. In addition 48 students were pre- and posttested on the SAT Reading Test Primary I, Form A Total Reading.

All raw score means increased from pretest to posttest. Correlated t-tests were performed on the raw scores for each instruments, all gains were statistically significant at the .01 level or better. (See Chart I.)

The program achieved its stated objectives.

CHART I
STANDARDIZED TEST SCORES FOR STUDENTS
IN THE ESL PROGRAM, GRADES K-8

Grade Levels		Raw Score Means Pre-test	Post-test	Gains
Kindergarten TOBE Level L	N=412	7	15	8
Grade 1 TOBE Level L	N=940	10	17	7
Grade 2 SAT Auditory	N=716	26	37	11
Grade 3 SAT Auditory	N=366	34	44	10
Grade 4 SAT Auditory	N=206	32	42	10
Grade 5 SAT Auditory	N=145	33	44	11
Grade 6 SAT Auditory	N=107	33	45	12
Grade 7 SAT Auditory	N= 97	32	45	13
Grade 8 SAT Auditory	N= 88	26	44	18
All Grades	N=3077			

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Introduction

Data were collected from 42 teachers who completed a questionnaire at a group meeting at the end of the school year. The questionnaire forms were constructed, pretested, and revised by the Office of Educational Evaluation with the assistance of Title I central nonpublic school administrators.

Data for the interview summaries were collected in eight schools. Each site visit included an observation of the Title I class and an interview with the teacher. The sites for this evaluation were selected randomly from a stratified sample of schools in the Title I English as a Second Language Program. The interview form was also constructed, pretested, and revised by the Office of Educational Evaluation with the assistance of the Title I central nonpublic school administrators. The interviewer was trained in the use of the form before the interviews began. The interviewed teachers were informed of the purpose of the interview: to feed back information to the program coordinators for administrative and evaluative purposes. The teachers were assured their responses would be reported anonymously.

Information About Teacher Respondents

Teaching Experience. Teachers were asked to indicate how many years of teaching experience they had. Responses to the teacher survey indicated that 26% of the teachers had one to five years total teaching experience; 43% had six to ten years experience; 21% had 11 to 15 years experience; 2% had 16 to 20 years experience and 7% had more than 20 years teaching experience.

All interviewed teachers had a minimum of five years teaching experience. Sixty-three percent of the teachers

had six to ten years experience, 13% had 11 to 15 years experience, 13% had 16 to 20 years experience, and 13% had more than 20 years experience.

Teaching Experience in the Title I ESL Program. Twelve percent of the survey respondents had been in the program one year, 15% had two years experience, 14% had three years experience, 14% had four years experience, and 52% had more than five years experience in the program.

Thirteen percent of the interviewed teachers had taught in the program for five years, 63% had been in the program for six to ten years, and 25% had 11 to 15 years.

Educational Background. The survey revealed that 12% of the teachers had only a BA/S degree, 10% had a BA/S degree and graduate credits, and 79% had a MA/S degree.

All of the interviewed teachers had a BA/S degree. Seventy-five percent had an MA/S degree, but the 25% teachers who did not have an MA/S degree did have at least 30 graduate credits in ESL. In addition, 50% of the teachers with an MA/S degree had also taken 12 or more graduate credits beyond the MA/S degree.

Professional Development and Activities. During the past three years, 86% of the survey respondents earned college credits, 12% attended Non-Title I Board of Education workshops, 26% attended UFT courses, 74% participated in Title I workshops, 43% attended local and national professional courses, 48% participated in publisher's materials workshops, and 45% took other non-credit courses.

During the past three years, all interviewed teachers were involved in some type of professional development: 75% of the teachers interviewed had taken courses for college credit; 50% indicated they were involved in some type of self-initiated professional activity; and 63% reported they had attended conferences or professional meetings, particularly the Teachers of English to Speak-

ers of Other Language (TESOL) and the regional New York State English to Speakers of Other Language Bilingual Education Association meetings. One teacher taught ESL to Chinese adults and Vietnamese "boat people" and another teacher had traveled to a Spanish-speaking country. All teachers had attended staff training program meetings.

Pupil Profile

Number of Students Taught. The survey data indicated that each teacher was assigned approximately 59 students.

Information gathered from the service interviews showed the number of students taught by any one teacher ranged from 52 to 65*. Seventy-five percent of the teachers taught at two sites and 25% of the teachers taught at only one site.

Criteria for Selection. In interviews, most Title I teachers (88%) responded that "limited English speaking" ability was a criterion for student selection into the program. The recommendations of the NPS classroom teacher (75%) and the Title I teacher (50%) were also identified as selection criteria.

Other criteria of selection reported by the eight interviewed teachers were: principal recommendations, low achievers in reading, low achievers in math, Spanish/English spoken in the home, severely disabled readers, and test results.

Participants in Selection. All interviewed teachers identified the Title I teacher as a participant in the selection of children for the program. Eighty-eight percent of the teachers recognized the classroom teacher and/or Title I guidelines as a determinant in the selection.

Of the 42 respondents to the survey, 98% indicated that the Title I teacher participated in the selection of

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* These results are based on the responses of seven of the eight teachers teachers [sic] interviewed.

the children in the program, 9% named the nonpublic school principal, 100% selected the classroom teacher, 17% named the guidance counselor and 43% named other Title I teachers.

Most Common Learning Problems. The survey listed eight learning problems and asked teachers to identify the three most common. The teachers' responses were as follows: problems from other achievement areas, 10%; attention problems, 19%; language problems, 81%; behavioral problems, 12%; poor listening skills, 34%; poor self-image, including fear of failure, 35%; retention skills, 33%; and general problems in concept formation, 29%.

The most commonly identified learning problems reported by the eight interviewed teachers were the four language skills; listening (86%), speaking (57%), reading (29%), and writing (29%). These were the only areas identified by more than one teacher. Additional problems mentioned were motor development, perceptual development, conceptual development, auditory discrimination, cognitive skills, motivation, following directions, transition from Spanish to English, vocabulary and language structure.

Teaching Methodology

Major Areas of Focus. The survey requested teachers to specify the major areas of focus for their instruction. The responses were: develop speaking skills, 100%; develop listening skills, 98%; conceptual development, 91%; develop cognitive skills, 83%; experiential development, 86%; develop writing skills, 64%; and develop reading skills, 64%.

All teachers interviewed named the four basic linguistic skills—listening, speaking, reading, and writing, as major areas of focus of instruction; 25% of the teachers indicated cognitive development as an area of focus. Other areas of focus named by 13% of the teachers included creativity and experiential development.

Motivation. When asked "What methods or techniques do you use to motivate your students?", surveyed teachers responded: games, 90.5%; graphs for self-tracking, 11.9%; reward system (stars, stamps, etc.), 83.3%; use of manipulatives, 69.0%; and other pupil self-evaluative techniques, 31.0%. This question was followed by "If you have noticed behavioral changes that indicate increased motivation, check the *two most obvious ones.*" The responses were: 26%, willingness to try more difficult materials; 71%, more pupil participation in Title I classroom activities; 17%, know what to do without asking; 29%, more attentive; 17%, greater rapport with teacher; and 38%, better self-image.

When the eight interviewed teachers were asked what methods or techniques were used to motivate students, many teachers responded "anything that will work." Specific motivation techniques included audio-visual aids (50%), games (50%), songs (38%), dramatizations (25%), language masters (25%), pictures (13%), and purposeful errors (13%).

The behavioral changes noticed by teachers that indicated increased motivation were increased participation (50%), "happy faces" (50%), and increased confidence (25%). Teachers also noted that students paid more attention (13%) and they seemed more mature (13%).

Peer Tutoring, Independent Study, and Individualized Instruction.

Teachers were asked if students were involved in peer tutoring, self-evaluations, or independent study. On the survey, the responses were: peer-tutoring, 52%; independent activities, 57%; and self-evaluation, 0%.

During the interviews most of the teachers (88%) indicated that their students participated in peer tutoring. This was usually informal, one student helping another. Seventy-five percent of the teachers reported that students evaluated themselves in some activities and 38% of the teachers indicated their students were involved in independent study (reading books independ-

ently, playing games independently, and/or doing rexographs independently).

Pupil Assessment. Table 1 summarizes the teachers' responses on the survey to pupil assessment methods. Surveyed teachers were asked to indicate the two major purposes of the initial pupil assessment: 38%, to individualize instruction; 40%, to organize group work; 21, [sic] to evaluate progress; 48%, lesson planning; 2%, record keeping; 40%, diagnosis; and 12%, teacher self-evaluation.

Eighty-eight percent of the eight interviewed teachers indicated that the Title I program assessment (Test of Basic Experience or the Stanford Achievement Test) was used to evaluate the pupil's ability. In addition, all interviewed teachers reported that students were also formally assessed by means of the Oral Teacher Interview and 63% of the teachers assessed their students informally during the first weeks of school through observation, picture discussions, games worksheets, etc.

TABLE 1

Percent of Title I ESL Teachers Using Various Assessments At the Beginning of the Year and During the Year

Assessments	Method used at beginning of the year	Method used during year
Title I program assessment	55%	55%
An informal reading test	2%	10%
A standardized norm referenced test	79%	67%
A standardized criterion referenced test	10%	12%
A teacher made criterion referenced test	52%	50%
Conference with classroom teacher	76%	81%
Classroom observation	0%	74%

All of the eight interviewed teachers used the results of the initial assessment to individualize instruction, to organize group work, and to plan long range lessons.

Fulfilling Title I guidelines and diagnosis were other purposes the teachers reported for the initial assessment.

During the interviews it was found that all teachers evaluated the students during the year through observations. Teachers observed classroom performance as well as out-of-class language performance. Thirty-eight percent of the teachers indicated they administered teacher-made or unit tests, 100% used the Spring administration of the SAT or TOBE test for reassessment, 25% distributed and evaluated rexograph sheets and 25% of the teachers based their reassessment on the evaluation grid.

Pupil reassessments were used by all interviewed teachers to individualize instruction, organize group work, and to fulfill the Title I guidelines.

Student Records. All interviewed teachers kept records of attendance, pre- and posttest standardized scores, individual profile charts, and pupil's work folders.

Most of the teachers kept records of parent conferences (88%), conferences with nonpublic school staff (88%), and referrals to supportive services.

Interviewed teachers were asked to identify their duties related to teaching. All teachers named the following duties as related to teaching: administer standardized tests, implement the instructional program, conduct needs assessments, organize instructional groups, write lesson plans, adapt or create materials, maintain pupil records, communicate with parents, and confer with classroom teachers.

Materials Used. All interviewed teachers were satisfied with the appropriateness of the materials and many in fact, gave high praise to the choice of materials. All teachers indicated that the Title I central staff and the Title I teacher chose the materials to be used. Some teachers volunteered that it was ultimately a joint effort between the central staff people and the teachers in the program; this issue was discussed at the general staff meetings.

Paraprofessionals. Of the six interviewed teachers who did not have paraprofessional assistance, two said they would like to have this assistance. It should be noted that paraprofessionals are employees of decentralized programs and as such, are hired, supervised and evaluated by community school district staff.

Paraprofessional staff when assigned by community school districts will, under the guidance of the Title I teacher: (1) work with the selected pupils on a one-to-one or small group basis on specifically planned activities geared to foster skills as diagnosed and taught by the Title I teacher; (2) assist with preparation of materials; and (3) assist with clerical and housekeeping tasks.

Pupil Selection. The pupil selection process was viewed as adequate by all teachers interviewed.

Support Services. The results of the survey asking teachers to specify all those who refer pupils to Clinical and Guidance Systems were: 98%, ESL Title I teacher; 81%, other Title I teachers; 98%, classroom teachers; 81%, principals; and 21%, parents. When asked to rate the Clinical and Guidance Services the survey respondents indicated:

Extremely effective	19%
Very effective	37%
Somewhat effective	35%
Don't Know	9%

It was reported by the interviewed teachers that pupils are referred to Clinical and Guidance Services by the classroom teacher (75%) or the Title I teacher (63%). Often the ESL teacher would talk to the regular classroom teacher informally and then decide to jointly request clinical and guidance services. One teacher (13%) said she never involved herself in referrals. All but one of the interviewed teachers (87%) felt the Clinical and Guidance Services Program was effective. One teacher

did not know the effectiveness of the services because she had never referred students to these services.

When asked what kind of support they received from the nonpublic school principal, the eight interviewed teachers generally spoke of the principal's cooperation. All of the interviewed teachers indicated that the principal provided orientation to school procedures. Eighty-eight percent of these teachers reported that the school principals encouraged coordination with the regular classroom teachers, initiated or were available for dialogue with the Title I teacher, and took care of scheduling matters.

On the survey, 86% of the teachers stated that the Title I central staff provided administrative visits, 89% reported supervisory guidance, 95% specified staff training meetings, and 98% named instructional materials.

The Title I central staff was reported by the interviewed teachers to provide: administrative visits (88%), supervisory guidance (88%), staff training (88%), and instructional materials (65%).

Parent Contact

Number and Frequency. The results of the survey indicate that the teachers meet an average of 35% of the parents. Thirty percent of the teachers reported seeing parents on a continuous basis, either weekly or monthly: 14.8% of the teachers saw some parents weekly; 16.2% reported monthly contact; 67.2% saw parents every reporting period; and 80.8% saw parents on a yearly basis.

The eight interviewed teachers met with 5% to 95% of the parents (four of the teachers met with 40%-50% of the parents). Seventy-five percent of the teachers reported that this contact was yearly, one teacher indicated weekly contact with some parents.

Method. Teachers, responding to the survey, indicated contact with the parents was face-to-face (78.3%

of the teachers reporting); by telephone (12.8%), by written communications (35.2%), and by parent-tutorial workshops (28.0%).

Interviewed teachers reported that they communicated with parents in a variety of ways: face-to-face (63%); telephone (38%); written communication/written progress reports (100%); parent-tutorial (13%); and through the classroom teacher (13%).

Initiation. Eighty-three percent of the Title I teachers indicated on the survey that they initiated the majority of teacher-parent contacts. In addition, 5% named the nonpublic school classroom teachers; 7% indicated the parents; and 2% reported the pupils initiated the majority of parent-teacher contacts.

All of the eight interviewed teachers indicated that contacts were initiated by the Title I teacher. One teacher identified parents as making initial contacts, and one teacher identified the regular classroom teacher.

Interviewed teachers indicated that parents are typically involved in "individual conferences to discuss the child's progress." Seventy-five percent of the interviewed teachers indicated that parents visit the classroom to observe.

During the interviews the teachers were asked if parents were involved with their children in activities at home related to their classroom teaching. The teachers responded that they were sure some parents were involved because notes to parents with suggestions for reinforcing communicative activities were given to the children to take home at least one time each year. The teachers, however, could not give a clear indication as to the degree to which these activities were actually carried out.

Major Concerns of Parents. Most teachers indicated on the survey that parents were concerned that their children were approaching grade level academic performance (81%). Other concerns were promotion (0.5%, and obtaining special services (2%).

Interviewed teachers reported that parents are concerned that their children will master the English language (63%), can read (38%), will be able to function in regular classes (25%), will not lose the first language (25%), and will behave appropriately in the classrooms (13%).

Recommendations

Survey results. On the survey, teachers were given six recommendations and asked to indicate which was most important for the improvement of the Title I English as a Second Language Program. The responses were:

(1) More Title I teacher involvement in materials selection—38%*

(2) More opportunity for coordination with the classroom teacher—26%

(3) More workshops based on Title I teacher input (re: teaching techniques)—17%

(4) Fewer students more often—12%

(5) No significant improvement is needed—7%

(6) More opportunity for coordination with other Title I personnel—2%

General. Most teachers interviewed responded that they were satisfied with the services given to children in the Title I Nonpublic School Program. Three teachers answered that the students needed more contact hours during the week.

Staff Development. Most teachers said that the staff development program was very good. Two (25%) said

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* It should be noted that teachers may not always be aware of the restrictions placed on the selection of materials by the Board of Education vendor guidelines and the federal restrictions on the content of materials in funded programs.

that although the staff development was good, they would like to have even more of it.

Coordination with Nonpublic School Classroom Teachers. The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff. It should be noted that Constitutional limitations and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

Coordination with Regular Classroom Teachers. The coordination with the regular classroom teacher, although informal, was ongoing and flexible. One teacher suggested regular classroom teacher could observe some ESL classes.

IV. *CLASSROOM OBSERVATION SUMMARY*

Classroom Characteristics

Lighting was usually adequate. In one particularly dark room, however, the lights should have been turned on. Orderliness was apparent in all rooms. There were clearly delineated areas for different kinds of activities. The same somewhat dark classroom mentioned above was also rather small in space. It seems to be a converted hall/staircase. It was, however, being used as resourcefully and optimally as possible. Ventilation was generally good, with the exception of two classes which needed a little more air.

General Observations. Generally there was a greeting routine in which the days of the week, months of the year, and the numbers—both cardinal and ordinal—were practiced. The objective of most lessons was readily perceived. The materials were adequate for the lessons. The activities coincided with the lessons' objectives. Some teachers said their ESL methodology was either audiolingual or eclectic. They used Carolyn Graham's jazz chants

effectively to develop pattern drills. The students appeared to enjoy these activities.

Observation Checklist: Teacher

The ESL classes were conducted according to a small group instructional model. Students were observed to be attentive to the teachers as they gave pre-activity directions or orientation comments. The teachers modeled appropriate linguistic behavior and provided encouragement and reinforcement through a variety of oral and written comments. The teachers worked along with the children while singing jazz chants, frequently taking a pupil's role while a pupil was the jazz chant leader. Pupils were observed to be attentive to other pupils during discussion periods and other activities. Pupils' work was displayed in all classrooms.

TABLE 2

OBSERVATION CHECKLIST: TEACHER (N=8)

Activities	% of Teachers Observed
1. Encourages children to work independently	75%
2. Encourages children to work together	88%
3. Talks with children about their activities for the instruction period	100%
4. Works along with children	88%
5. Helps children solve academic problems	100%
6. Encourages/reinforces children in their work	100%
7. Gives feedback to children on their progress	100%
8. Pupil diagnosis/prescription	63%
9. General discussion with pupils	13%
10. Allows for pupil choice in activities	50%
11. Displays children's work in the classroom	100%

V. *SUMMARY OF INTERVIEW WITH ESL PROGRAM COORDINATOR AND FIELD SUPERVISOR*

Introduction

The interviews with the program coordinator and the field supervisor were both two and one-half hours long. The coordinator has been involved with this Title I program for 11 years—two years as a teacher, three years as a field supervisor, four years as acting coordinator, and one year as coordinator. The supervisor had been in the program as a teacher for six years and as a field supervisor for the past four months. Their responses are reported together when the two agree; when they disagree, their responses are differentiated.

Program Considerations

Goals. Both the field supervisor and the program coordinator identified the goal of the program to be instruction in English—providing the child with both a knowledge of the language as well as the culture. They added that the child is made to feel confident in adjusting to the new environment by having teachers refer to the pupils' native culture and help the child retain the native language. The development of these goals has been on-going. The Title I coordinators, teachers, administrators and general staff contribute to this on-going process. The field supervisor stated that the implementation of these goals has changed since the beginning of the program. Initially the focus of the instruction was audiolingual; today it is eclectic. The field supervisor stated the curriculum has changed since the beginning of the program and the goals have become comprehensive.

Strengths and Needs. The greatest strength of the program was identified as the high level of teacher training and dynamics—all teachers have ESL skills. There are a variety of materials to meet the needs of the individual student, a result of the teachers' input in ordering

these materials. In addition, the good organizational structure was seen as a strength of the program. When asked what parts of the instructional program were in need of strengthening, the field supervisor felt that he needed to spend more time in the field; he felt that there were too many nonfield responsibilities which limited his time. The program coordinator also indicated a need for more time to see the teachers and make classroom observations. The program coordinator also felt that more teacher training demonstrations were needed so that the teachers could and would implement the curriculum more effectively.

Next year the curriculum is being revised. Some cognitive goals are being expanded or combined, and there will be modifications in the sequencing of instructional items.

Purpose of the Program Assessment. The program assessments give an overall picture of the students' achievement by testing the individual's receptive and productive language. The program used standardized tests and oral language interviews to diagnose and assess pupil achievement. The program coordinator feels, however, that the informal day-to-day evaluations provided the most meaningful assessments.

Instructional Considerations

Approaches to Instruction. An eclectic approach to instruction is utilized in the ESL program. This includes speakers, demonstrations, traditional teaching methods, jazz chants, textbooks, and silent reading. Teachers stated that they used any method that would help to motivate the students. Audiolingual methods are also used.

Daily Lesson. The daily lesson is correlated to the curriculum guide and usually includes a greeting, review of items, audio-visual presentations, practice of newly taught items, and an evaluative summary.

Motivation. The coordinator and field supervisor were asked the question, "What methods and techniques are

teachers expected to use in motivating students?". There response was that teachers use any method and/or technique that is appropriate to the level of the students, and that will serve to motivate the students.

Overlap Between What is to be Taught and What is Tested. Regarding standardized program assessments, the overlap between what is taught and what is tested is rather limited in the SAT test, but a bit more satisfactory in the TOBE instrument. However, informal teacher assessments address themselves completely to the content that is taught.

Introducing New Ideas, Approaches, Topics. In the past three years, there has been a shift in the methodology from an audiolingual focus to one that is more eclectic, including greater emphasis on reading. New ideas, approaches, and topics were introduced after the initial assessment of need and followed by discussions, by groups of teachers interested in the curriculum and proposed changes.

Student Considerations

Reporting of Student Progress. Student progress is reported to students by immediate feedback and unit-end assessments. Feedback is given to parents at various times during the year through progress reports (See Appendix), parent meetings, and demonstration lessons. The principal as well as the classroom teacher gets on-going feedback on the progress of the pupils.

Retention of Students. Retention of students in done according to the mandate to serve those with the greatest needs. There is no set rule for how long a student may remain in the program, but it is usually no more than three years. The total time may depend upon the amount of student-teacher contact.

Personnel Considerations

Supervisory Staff's Responsibilities. The supervisory staff makes site visits for the purpose of giving addi-

tional assistance and monitoring the program. Every teacher is formally evaluated once a year. The program coordinator stated that she meets regularly with the other Title I coordinators. In addition, the supervisory staff meet with the principals, the Title I staff, the paraprofessionals and parents to discuss aspects of the program and possible changes.

Strengths and Needs of Instructional Staff. The teachers' enthusiasm, their willingness to innovate, and their training are seen as the strengths of the instructional staff. The program coordinator stated that teachers need to become stronger in the area of record keeping. New forms were to be developed this coming year to help in this area. The field supervisor indicated that the teachers need to expand their awareness of the cultures of the pupil target population.

Recommendations

General. The program coordinator suggested that there be earlier identification of Title I eligible students, as well as an earlier allocation of monies. The field supervisor added that there is interference with the initial teacher placements because of budgetary problems.

Staff Development. Additional training sessions were recommended for the teachers. The field supervisor suggested more input from outside agencies.

Materials. It was recommended that more monies be allocated to allow a wider variety and a larger number of materials, especially textbooks.

Para-professional Services. The field supervisor recommended that para-professionals assigned to this program be screened adequately for linguistic preparation in order to serve as models for the pupils even though the Title I program has no control over the selection of paraprofessionals. This selection is made by the Community School Districts.

Pupil Selection. No recommendations were made in this area. Both the program coordinator and the field supervisor felt satisfied with this process.

Coordination with Regular Classroom Teachers. Although there is informal contact, the program coordinator suggested that structures be studied within the constraints of the present regulations to increase the communication between the ESL teacher and the regular classroom teacher.

Coordination with Other Title I Staff. The program coordinator felt that this coordination was good. The field supervisor recommended that the guidance personnel address the ESL staff. He also suggested that there be more interaction of cognitive skills gained in the ESL classes with those gained in reading, language arts, mathematics, etc.

VI. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

The Title I English as a Second Language Program offers teachers a wide variety of materials and approaches to utilize in teaching English. The teaching approach was characterized by the teachers and the program coordinator as eclectic. Overall, teachers appeared enthusiastic about the program and offered praise for the materials and staff development received during the year.

In all classrooms visited, teachers were observed encouraging and reinforcing children at work. The atmosphere in many of the classrooms was lively. Jazz chants were used effectively to develop pattern drills; children appeared to especially enjoy this activity.

A recommendation voiced by 26% of the teachers and the program coordinator was that efforts be made, within the program guidelines, to increase communications between the classroom teachers and English as a Second Language. The evaluation team supports this recommendation.

Regarding the implementation of the revised curriculum during the 1980-1981 year, the following recommendations are offered: 1) efforts should be made to monitor the implementation of the revised curriculum, 2) obtain feedback on the effectiveness of the curriculum from classroom teachers, and 3) the impact of the curriculum on program objectives should be assessed.

The last recommendation relates to the development of the program assessment instruments. The program coordinator stated the information presented on the standardized test, did not adequately overlap with the program's curriculum and instructional objectives. Therefore, it is recommended that the program administrators begin to develop more appropriate program assessments.

DEFENDANTS' SUPPLEMENTAL EXHIBIT E

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT
ESEA TITLE I

Project Identification Number: 5001-64-01626

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAMS
CLINICAL AND GUIDANCE SERVICES
1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Clinical and Guidance Services Program, hereafter called the Clinical and Guidance Program, served 8,662* nonpublic school students in grades K-12 at 178 sites. These students received Title I instructional services and were judged to be in need of clinical and/or guidance services. The basic assumption underlying this program, as stated by the Title I Nonpublic School Director, was that

> . . . a large number of pupils who participated in our program suffer educational deprivation for a variety of causes encompassing physical, intellectual, emotional and social development. The remediation process cannot attempt to deal only with one causative factor in isolation, and ignore the other determinants that may be interfering with the child's academic progress. Thus, we provide remediation through a multiple thrust of instructional and supportive programs, which provide of equal importance in compensation, for the multiple causes of the child's educational deprivation.

The major components of the program were individual and group sessions with guidance counselors, social workers and/or psychologists.

Students entered the Clinical and Guidance Program through referrals by the Title I instructional teacher, the nonpublic school classroom teacher or the principal. A pre-rating scale was completed for each child that was accepted into the program. (See Appendix). The guidance counselor and/or social worker determined which approach was best suited to the student and provided the needed services. The clinical and guidance staff might refer a pupil for diagnostic evaluation to a psychologist

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* Duplicated count, students could be enrolled in more than one Title I Instructional Program.

who served groups of schools on a pupil referred basis. If students were diagnosed as having physical and/or intellectual deficiencies that required special education, they were referred to the appropriate place (i.e. classes for brain injured pupils, certified retarded or mentally defective, emotionally handicapped, etc). The program also provided individual and group work with parents of referred pupils. Nonpublic school classroom teachers and Title I instructional teachers were invited to case conferences and were involved in formulating treatment plans.

The program operated under the regular practices and procedures of the Bureau of Child Guidance and the Bureau of Educational and Vocational Guidance. The staff included 3.5 full-time equivalent (FTE)* supervisors, 1.5 FTE coordinators, 72 FTE guidance counselors, 9.9 social workers, 23.9 FTE psychologists and 526 hours of time of psychiatrists. In addition, secretaries and clerks were employed by the program.

The purpose of this evaluation report is to report student achievement data, describe program implementation from the teachers' and coordinators' perspectives, and to indicate directions from a more in depth evaluation during the 1980-81 year.

II. *DATA ANALYSIS*

Evaluation Objectives And Tests Used

Students referred to the Clinical and Guidance Program were to achieve gains in performance in reading, mathematics, and English as a second language (ESL), greater than would have been expected in the absence of treatment. Student achievement was evaluated according to the USOE Model A1, using the pretests and posttests administered in the Title I instructional programs.

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* FTE: One FTE is equivalent to one full-time staff position. Some staff persons are hired on a part-time or per diem basis; therefore, the amount of services is expressed in FTE's in lieu of reporting the number of staff employed.

Reading improvement was evaluated on the basis of the performance on the Stanford Early School Achievement Test, for pupils in grade 1; the Stanford Diagnostic Reading Test, for pupils in grades 2 through 8; and the Stanford Test of Academic Skills, for pupils in grades 9-12.

Mathematics achievement was evaluated on the basis of the performance on the Stanford Early School Achievement Test, for pupils in grade 1; the Stanford Achievement Test for pupils in grades 2-8; and the Stanford Test of Academic Skills, for pupils in grades 9-11.

Student performance among those students receiving services from the Clinical and Guidance Program and ESL was not evaluated. This was done because the standardized instruments used in ESL have not been normed on appropriate populations and could not be expressed as Normal Curve Equivalents (NCE's).

Analyses Performed And Results

Performance gains as determined by standardized tests. In order to determine performance gains in cognitive areas, it was necessary to identify the test records of students receiving clinical and guidances services. A computer match was performed between the test record files submitted for the Title I instructional programs, and the file identifying students receiving clinical and guidance services. The computer retrieved all students whose names and schools were coded identically on the two sets of files.

From "retrieved" students, all records were selected for analysis which met the following criteria: pretest and posttest raw scores were available; and the raw scores could validly be expressed as Normal Curve Equivalents. The effect of this criterion was to exclude (1) students tested out-of level (because fall or spring norms were

lacking); (2) all ESL tests (which lack full sets of norms valid for ESL students).

There were 4,341 test records available for analysis for students in the Corrective Reading Program, 368 for students in Reading Skills Centers, and 3,204 for students in the Corrective Mathematics Program. Scores for these students are presented in Tables I, II, and III.

These data on the academic performance of pupils do not separate the influence of the remedial instruction from the gains attributed to the Clinical and Guidance Program. To separate these two variables is not possible within the framework of the present program. First, no fair comparisons can be made between children receiving clinical and guidance services *plus* remedial instruction with children *only* receiving remedial instruction, since all children needing clinical and guidance services are referred for service, and are by definition, "different" than those not being referred for services. To randomly select children, who need services, to become part of a control group not to receive service would be considered unethical by school staff and in violation of the Title I guidelines.

Second, since the children receiving clinical services have problems which inhibit their academic progress, one cannot assume that these children will perform better than or as well as other remedial students not receiving clinical and guidance services.

The third factor is an extension of the above two factors. One cannot measure the effects of varying hours of service received from clinical and guidance for two reasons; receiving more hours of service does not mean higher gains since the child with more severe problems received more hours of service; and, no baseline academic performance (performance of children needing clinical and guidance services, but- not receiving them) can be obtained from which to calibrate NCE gains based on hours of service.

However, the children receiving clinical and guidance services do show NCE's gains. This is commendable since these children, already receiving remedial services, were identified as having problems further affecting their academic performance.

Although there is no true comparison group, one could compare a pupil's rate of growth the year before receiving clinical and guidance services with his or her rate of growth the first year in the Clinical and Guidance Program. If it were possible to explain all of the effects of the intervening variables such as maturation, history, etc., the effects of the Clinical and Guidance Program could be better assessed. Similar case study methods are currently being used to study treatment effects on individuals where comparison groups do not exist or are not relevant.

TABLE I

TEST RESULTS FOR CORRECTIVE READING STUDENTS RECEIVING SERVICES FROM CLINICAL AND GUIDANCE

Grade	Test	N	NCE (mean) Pretest	NCE (mean) Posttest	NCE gain
1	SESAT—Environment	73	22	32	10
	SESAT—Aural Comp.	76	24	33	9
	SESAT—Letters & Sounds	75	33	40	7
2	SDRT Red	536	27	33	6
3	SDRT Green	680	25	37	12
4	SDRT Green	749	28	35	7
5	SDRT Brown	696	24	34	10
6	SDRT Brown	529	25	35	8
7	SDRT Brown	347	28	35	7
8	SDRT Brown	239	28	39	11
9	Level I	201	14	23	9
10	TASK Level I	112	17	23	6
11	TASK Level II	26	7	21	14
12	TASK Level II	2	18	25	7

TABLE II

TEST RESULTS FOR READING SKILLS CENTER STUDENTS RECEIVING SERVICES FROM CLINICAL AND GUIDANCE

Grade	Test	N	NCE (mean) Pretest	NCE (mean) Posttest	NCE gain
4	SDRT Green	31	25	36	11
5	SDRT Brown	74	24	35	11
6	SDRT Brown	83	23	34	11
7	SDRT Brown	95	26	35	9
8	SDRT Brown	85	28	39	11

TABLE III

TEST RESULTS FOR CORRECTIVE MATH STUDENTS RECEIVING SERVICES FROM CLINICAL AND GUIDANCE

Grade	Test	N	Mean NCE Pretest	Mean NCE Posttest	NCE gain
1	SESAT	24	30	51	21
2	SAT, PRIM 1	427	27	32	5
3	SAT, PRIM 1	570	25	32	7
4	SAT, PRIM 3	586	28	37	9
5	SAT, INTERM 1	564	29	34	5
6	SAT, INTERM 2	426	27	36	9
7	SAT, ADVANCED	250	27	36	9
8	SAT, ADVANCED	172	28	34	6
9	TASK Level I	100	30	39	9
10	TASK Level I	69	31	36	5
11	TASK Level I	15	*	*	*
12	TASK Level II	1	17	29	12

* Although Level II was specified in the evaluation design, Grade II students were actually tested with TASK, Level I. Eleventh grade norms are unavailable for Level I, so that results are not reported for this grade.

II. [sic] *CLINICAL AND GUIDANCE STAFF INTERVIEWS SUMMARY*

Introduction

Data for this section of this report were collected in seven schools during the period from May 19, 1980, to June 6, 1980. The sites were selected randomly from a stratified sample of schools in the Title I Clinical and Guidance Program. A small random sample of clinical and guidance staff were also interviewed in order to identify areas for more intensive evaluation during 1980-1981. The interview form was constructed, pretested and revised by the Office of Educational Evaluation with the assistance of Title I central administrators. The interviewer was trained in the use of the form before the interviews began. All interviewed personnel were informed that the purpose of the interview was to feed information back to the program coordinators and the Office of Educational Evaluation. They were assured complete confidentiality and anonymity to their responses. Each interview took between 15 and 60 minutes. The average ti.. for the interviews was 34 minutes.

This section of the report is based on interviews with eight guidance counselors, three psychologists and one social worker.

The functions of the various clinical and guidance staff are as fo!lows:

> *The Guidance Counselor shall:* study pupil needs through the examination of records, observation, consultation, and interviews; assist pupils in evaluating their abilities, aptitudes, attitudes, and interests and interpret these in planning appropriate intervention; provide individual and group counseling; develop group techniques as a method of providing educational guidance, career exploration and developing insight into personal and social problems;

interpret pupil data to staff members and cooperatively plan and carry out measures to meet pupil needs; interpret pupil data to parents and seek parental cooperation in formulating and carrying through appropriate plans; work with special school services such as the Evaluation and Placement Units to insure that identified pupils are placed in optimum situations and cooperate with community agencies to provide services to referred pupils.

The School Social Worker shall: study the child, particularly his/her family and life situation, to discover physical, social or emotional factors which have inhibited learning; provide individual and group therapy to students which will facilitate the development of satisfactory interpersonal relationships and work habits; assist the learning disabled student by working both with the child and with the parent; help the staff and parents to respond to the student through new prescriptive approaches which make learning a more satisfying and positive experience.

The School Psychologist shall: study referred children and, through the use of psychological techniques, evaluate intelligence and achievement levels, growth and adjustment; participate in case conferences and offer suggestions to instructional staff for prescriptive approaches to reverse patterns of academic failure; provide therapy for children and their families both individually or in groups in order to help facilitate more satisfying ways of coping both in the learning and total life situation; confer with parents of pupils with special learning disabilities to extend their understanding of their child's problems and, if indicated, elicit parental cooperation in effecting special class placement.

The Psychiatrists shall: Examine those pupils referred by the counselor, social worker or psychologist

where psychiatrict [sic] diagnosis is necessary in order to effect proper placement and to define treatment needs and goals.

Major Focus For Improvement of Pupil Functioning In Academic Areas

Respondents were asked: "In accordance with the Title I guidelines, what are the major areas of focus of the clinical and guidance component to improve pupil functioning in the academic areas?" Most answers regarded helping underachieving students to realize their full potential by working on learning and/or emotional problems that might be causing the underachievement.

The Clinical and Guidance Program staff perceived their role to be a liasion between the school, the parents, other professionals (e.g., psychologist, guidance counselor, etc.), the public school system and outside agencies. All of the interviewed staff indicated that their major foci were individual counseling, consulting with Title I nonpublic school staff, serving as a resource person, and enlisting parental aid. Also mentioned as areas of major focus were group counseling (92%), and diagnosing learning difficulties (67%).

Activities And Duties

All of the clinical and guidance personnel were asked to specify their duties and activities. The response of the one school social worker interviewed was: (1) to encourage teachers to respond to the child through individualized approaches; (2) to encourage parents to respond to the child through individualized approaches: (3) to counsel parents, students, teachers and principals; (4) to make referrals to other community agencies; (5) visit homes; (6) to study the family and life situations of the child to identify problems; (7) to provide individual and group therapy to students; and (8) to counsel the learning disabled child and family.

Three school psychologists were interviewed. When asked to state their duties and activities, all three responded: (1) to evaluate intelligence and achievement levels; (2) to evaluate learning patterns; (3) to participate in case conferences; (4) to advise instructional staff on helpful prescriptive approaches (5) to confer with parents of learning disabled children; (6) to elicit parental cooperation for appropriate placement; (7) to interpret test findings to parents; (8) to interpret test findings to teachers. Two of the three also said their activities included monitoring the child's progress, classroom observations and referrals to outside agencies.

When asked to identify main duties and activities, the eight guidance counselors all responded: (1) to examine records, observe, consult and interview to determine pupil needs; (2) to plan interventions; (3) to provide individual and group counseling; (4) to develop group techniques for providing guidance; (5) to plan cooperatively with parents; (6) to work cooperatively with special school services on placements; and (7) to cooperate with community agencies to provide services to referred pupils. Most of the staff also indicated that their duties included assisting pupils in self evaluations, interpreting pupil's self evaluations, interpreting pupil data to the other staff, interpreting pupil data to parents and planning cooperatively with the staff. Two guidance counselors also said they help provide information to the students about high school placement.

Pupil and/or Program Records

All of the clinical and guidance personnel indicated that they keep pupil and program records. All of the personnel kept contact sheets, case lists, weekly or monthly logs and referral sheets. Also mentioned were eligibility lists, pre- and post-rating scales (submitted by the referring teacher for each child), parent contact forms, confidential case files, and consent forms.

Supportive Services

Central Staff. Clinical and guidance personnel were asked what supportive services they received from Title I supervisory staff. All of the personnel mentioned supervisory visits, supervisory guidance and evaluations, in-service training, and materials.

In addition to the purchase of bulk materials for the total program, the clinical and guidance staff are provided with a cash allotment in order to individualize the purchase of manipulative materials.

Other Adults. Response was fairly consistent to the question, "When you are working with pupils to enhance their academic functioning, what adults do you involve in your treatment plan?" All clinical and guidance personnel indicated the parents and/or family, the Title I referring teacher and the regular classroom teacher. Most named the principals and some interviews also mentioned other clinical and guidance staff and the Title I instructional staff.

Recommendations

General Recommendations. General recommendations made by more than one clinical and guidance staff member included: (1) provide more days in each school, more staff and more clinical and guidance services (that is, expand the program to serve more children; (2) broaden the guidelines to allow more time for other services (i.e. workshops); (3) more Title I classes, perhaps for learning disabled children; (4) provide more work with community resources; (5) set aside more space in schools; (6) provide telephones for Title I personnel. One of the psychologists recommended research in preventive techniques and psychologists training in group dynamics.

Staff Development. Several of the staff members suggested additional workshops that focus on refining professional skills, learning about new laws and new diag-

nostic instruments, and sharpening sensitivity to peoples of other cultures.

Materials. Staff members stated they would like additional materials including more professional reference books and manipulative materials.

Pupil Selection. Selection of the students to the Clinical and Guidance Program is made by the clinical and guidance staff member together with the Title I teacher from among eligible students serviced in the Title I instructional programs. Many staff members expressed frustration at not being able to work with students who were not enrolled in any Title I instructional program, since the staff had requests to service them.

One staff member suggested setting up a maintenance system to follow-up on students discharged from the Title I instructional programs.

Coordination with Regular Classroom Teachers. Most of the interviewers said they meet with the regular classroom teachers informally, usually at lunch, since many teachers in the nonpublic schools do not have any free time. In addition, one teacher mentioned the importance of have definite times scheduled at the beginning of the school year for student appointments in order to facilitate cooperation between the Title I clinical and guidance staff and the nonpublic school classroom teacher.

Classroom teachers are invited to all case conference at which time individual student progress is assessed. Classroom teachers are also involved in formulating comprehensive treatment plans.

Coordination With Other Title I Staff. Eleven members (83%) of the clinical and guidance staff expressed satisfaction with the coordination with other Title I Staff. During formal and informal conference periods student progress was discussed. Two staff members found it difficult to meet with other staff members because of conflicting schedules and staff changes.

IV. *SUMMARY OF INTERVIEWS WITH PROGRAM COORDINATORS*

Program Consideration

Goals. The aim of the program was to help children function better in the basic areas of reading and mathematics. The program approached their goal by obtaining a diagnosis of the child's behavioral problems. These goals were developed with the academic progress of the child as the primary end. The clinical and guidance staff focussed on problems that might be interfering with academic progress.

Strengths and Needs. The clinical and guidance services were provided to students who demonstrated the greatest need for them. An interdisciplinary approach, a staff of highly trained professionals, and a good ratio of staff to children were all seen as program strengths.

The greatest need of the program was additional staff to service more children (i.e., accoridng to the staff perception).

New Ideas/Approaches/Topics. Over the last three years program changes included increased internal referrals, increased conferences with the nonpublic school teachers, and more emphasis on working with parents and the community.

Student Considerations

Frequently Occurring Problems. Underachievement was named by both coordinators as the most frequently occurring problem. They also mentioned "acting out" and withdrawn behavior as problems. One coordinator named family problems and the ability to relate to others and the other mentioned physical problems (obesity, hyperactivity and mental retardation) as the other common problems.

How Students were Referred. Students were referred to clinical and guidance services by the Title I instruc-

tional teacher, the regular classroom teacher and/or the nonpublic school principal.

How Students were Diagnosed and Evaluated. The clinical and guidance staff classroom teachers are in constant communication about the child's progress. When it becomes apparent that all of the variables which indicate change in personality show positive progress, the child is seen less often in counseling. Improved grades on report cards and testing, and positive teacher comments on behavior, form the multiple criteria for closing a case.

Social workers generally took social histories and used this information in working out a treatment plan for the child.

Guidance counselors used the pre- and post-rating form that were filled out by the referring teachers; these checklist of behaviors are the teachers evaluation of the child's needs. (See Appendix.) In addition to the teacher ratings, the counselors also conducted informal interviews with the child. All of the available information on the child is used to make a treatment plan for the child. Notes were kept in individual files on each child seen by the counselor.

How Students Were Reassessed. The child's progress was discussed with the Title I instructional teacher and regular classroom teacher; recommendations for different approaches were made if the child was not improving. This reassessment was done on a regular basis.

How the Interpretation of Diagnostic and Evaluation Procedures was Reported to Parents. Parents were involved from the beginning. They gave their consent before any testing was done and then were given feedback after the evaluation was completed. The principal, the classroom teacher, and the Title I instructional teacher were also informed of the diagnostic findings.

When Services were Ended. Treatment was terminated if the child showed academical and behavioral improvement.

Participant/Staff Ratio. Participant-staff ratio for program activities varied from one to one, to a small group meeting, (six to eight pupils) or to a larger group setting for pupils, parents and instructional staff members.

Frequency of Instruction. Duration and frequency of activities varies directly with the needs of the individual, the type of activity and the availability of staff as well as the number of days of service in a school.

Emergencies. Emergencies that occurred included aggressive and violent behaviors, suicide threats and family break-ups. The clinical and guidance staff dealt with the immediate crisis by talking to the persons involved—the child, the parents, the teacher—and referral was made to an outside agency for continuation of treatment if the child was not enrolled in any Title I instructional program.

Staff Considerations

Staff Involvement with the Title I Teacher and the Regular Classroom Teacher. A team approach was used. Clinical and guidance staff met with Title I teachers and the regular classroom teachers to discuss individual cases.

Outside Agencies. The length of time taken by outside agencies to respond to referrals varied depending on the agency and its location.

Materials. According to the coordinator, counselors are given a shopping bag full of materials to supplement the supply of manipulative materials which have been maintained at each site throughout the entire history of the program. Counselors are told that they may individualize their purchases when they are given their allotments each year. They also are informed that they may request reference books for the library. Puppets are routinely provided each year and some counselors have chosen to buy doll houses.

Recommendations

General. General recommendations included providing more supervisors and staff and building in more time for training and staff development.

Regarding staff development, last year at least seven unpaid speakers and workshops leaders volunteered their time to the Guidance Program. These volunteers came from a variety of places including state agencies, mental health clinics, hospitals and priviate [sic] institutes.

V. *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

The following concerns were expressed by Clinical and Guidance Services personnel during interviews with the evaluation concultant: [sic]

1) Clinical and guidance staff members expressed a desire to be included in the other program component staff meetings.
2) Lack of adequate space was seen as a problem in some of the schools.
3) Staff members voiced a need for more staff development.

The evaluation team recommends that the program coordinators discuss these issues with the staff during meeting times and explore ways of solving these problems within their legal and budgetary restraints.

The program coordinators expressed a desire to revise the Behavior Rating Scale. The revision of this scale has been identified by the Office of Educational Evaluation as a priority area for the investment of effort for 1980-1981.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 78C-1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HIRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION; and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

AFFIDAVIT

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

JOHN F. STAEHLE, being duly sworn, deposes and says:

1. I am Deputy Director of Compensatory Education Programs, Office of Elementary and Secondary Education, United States Department of Education ("ED"). I have worked at the Federal level on the program under Title I of the Elementary and Secondary Education Act of 1965 ("Title I") since its inception. Prior to assuming my present position, I served as Director of the Division of Grants, Policy and Administration in the Office of Compensatory Education in the U.S. Office of Education. My official duties include the immediate supervision of ED personnel charged with administering Title I at the

Federal level, and advising State educational agencies, and through them, local officials charged with administering Title I at the State and local levels. The statements in this affidavit are based on my personal knowledge except where otherwise indicated.

2. I understand that this affidavit is to be submitted as part of the trial record on behalf of defendants in this lawsuit. The purpose of my statements in this affidavit is to supplement and update the affidavit of Genevieve Dane dated April 20, 1979, originally filed in the case of *National Coalition For Public Education and Religious Liberty, et al. v. Harris, et al.*, 489 F. Supp. 1248 (D.S.D. N.Y. 1980). My official duties are virtually identical to those performed previously by Genevieve Dane.

3. Fiscal Year 1982 funds are currently being expended. The amount of Title I appropriated for Fiscal Year 1982 is $3,104,317,000. According to the most recent available data, Title I services in the 1980-81 school year were provided to 5,170,935 public school children and 192,994 private school children. Based on these figures, about 3.7% of the participants in the Title I program attend private schools. It is estimated, according to the latest available data, that about 4% or $105,200,000 of the Title I appropriation for Fiscal Year 1980 was spent on services for private school children.

/s/ John F. Staehle
JOHN F. STAEHLE

Sworn to before me this 12th day of May 1982.

Richards Warhome
Notary Public

My Commission Expires
May 15, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS,
INTERVENOR-DEFENDANTS

REPLY AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STANLEY GELLER, being sworn, states the following:

1. I am the attorney for the plaintiffs in this action. I submit this affidavit in opposition to defendants' cross-motion for summary judgment and in further support of plaintiffs' motion for summary judgment.

2. I have been asked by Leo Pfeffer, Esq., who was the lead counsel for plaintiffs until April 22, 1982, to an-

nounce to the Court and opposing counsel that he has withdrawn as counsel for plaintiffs as part of his retirement, on the aforementioned date, from the active practice of law. I salute a great constitutional lawyer and champion of religious liberty.

3. The main purpose of this affidavit is to call this Court's attention to the Evaluation Reports submitted as exhibits to the affidavit of Lawrence F. Larkin, dated May 12, 1982, on behalf of defendant Macchiarola, as Chancellor of the Board of Education of the City of New York, in opposition to plaintiffs' motion and in support of defendants' motion. As the Court will see when it reviews the papers submitted in connection with both motions, there are five such Reports, one for each program of remedial services provided by the City of New York, with Federal Title I funds, to nonpublic schools within the City, almost all of which are religious schools.

4. It is respectfully submitted that those Reports, carefully read, demonstrate conclusively that the Title I Program of New York City violates the Establishment Clause of the Federal Constitution. More specifically, it is submitted that the Reports show (1) that the Program necessarily involves an ever-increasing entanglement of Church and State in New York City, (2) that the Program has the primary effect of aiding Church schools, as such, and (3) that there is little merit to defendants' "child benefit" theory in this case, to the extent that such theory saves the Program from being declared unconstitutional after *Meek*.

5. For the convenience of the Court, excerpts from the Evaluation Reports are set forth in the five exhibits annexed to this affidavit. The letter of each such exhibit corresponds to the letter assigned to it as an exhibit to the Larkin Affidavit.

6. The excerpts demonstrate that, with insignificant differences in numbers, each program of remedial services places each public school teacher (referred to in the excerpts as "Title I teacher") in constant, daily com-

munication with his religious school counterpart ("regular classroom teacher") and/or the religious school staff and principal. The resulting picture is completely at odds with that painted in defendants' papers, where the Title I teacher is depicted as if he or she were hermetically sealed off in his or her Title I classroom, or "school within a school," just as the materials used in that classroom are, allegedly, locked up whenever not in use. In actual fact, as stated in one of the excerpts, the Title I teacher works "as a team" with the religious school educators, as if he or she were an integral part of the school's faculty.

7. What follows from the foregoing, as the excerpts also show, are several things, first and foremost of which, for the purposes of the present case, is that there is an ongoing dialogue between the Title I teacher and the religious educators in which they exchange information and advice, not only concerning the activities of the Title I students within the Title I classroom and concerning their Title I curriculum, but also concerning the activities of the same students and their fellow students in their regular classroom and concerning the regular curriculum.

8. Before going into the significance of this dialogue, it is necessary to call attention to something else in the Larkin Affidavit, specifically in paragraph 5, where the affiant asserts how, since April 1979, when he submitted a similar affidavit in what plaintiffs call the "*Hufstedler*" case and defendants call the "*PEARL*" case, the New York City Title I program, has allegedly remained "religiously neutral." In spelling out what he means, the affiant alludes to an absence of what would constitute gross violations of such neutrality, such as a Title I teacher's "becoming involved with the religious activities of the nonpublic schools, ..." He ends with a reference to the fact that Title I classrooms are bare of "any religious statutes [sic], symbols, pictures or artifacts, ..."

9. To begin at the end of the aforementioned paragraph, the concept that a local government *avoids* a viola-

viewed staying after the school day as punishment; (v) many students had after-school jobs or family chores to perform; (vi) parents were concerned for the safety of their small children; and (vii) children were rarely willing to attend such programs on a Saturday.

(b) The children actually attending after-school programs did not receive comparable services because (i) they were fatigued or lacked concentration; (ii) Title I personnel—many of whom had other duties during the regular school day—also were tired, and thus many performed at less than full effectiveness; and (iii) in some cases, it was impossible to hire sufficient numbers of qualified specialists to provide services after the regular school day.

(c) Serious logistical problems developed because of the necessity of conducting Title I programs other than during the regular school day. They included the following: (i) buildings were sometimes not opened early enough for programs scheduled to begin before regular school hours; (ii) schools were sometimes unable to provide proper supervision for participating children during the time interval between the end of the regular school day and the commencement of the Title I programs; and (iii) supervision of children walking from their nonpublic school to a public school center was inadequate.

(d) The optimum length and frequency of remedial instruction was determined by Missouri State guidelines to be one 50-minute class every day during the school week. The scheduling of Title I classes after school or on Saturday, however, meant that programs were conducted only once or twice a week, or for longer periods than 50 minutes—one hour and 15 minutes to two hours on weekdays and three to four hours on Saturdays.

(e) Although maximum effectiveness of Title I services depended to a large degree upon contact and coordination between Title I teachers, on the one hand, and the regular school teachers and parents, on the other, such contact was much less frequent when the Title I pro-

gram was conducted before or after the regular school day or on Saturdays.

(f) Significantly larger proportions of budgeted Title I funds were spent on non-instructional expenses, such as security and transportation, in Title I programs directed to eligible nonpublic school students than in the programs for public school students. Consequently, proportionately less was spent for instructional expenses in the programs for nonpublic school children. Def. Exh. U (Tab A-2, ¶ 15).

26. Based upon the findings of this study, the Commissioner determined that the Title I services provided to eligible nonpublic school students in the four LEAs in Missouri were not comparable in quality, scope or opportunity for participation, and consequently directed that the United States Office of Education arrange directly for the provision of such services in those LEAs. A similar determination has been made with regard to additional LEAs in the state. Def. Exh. U (Tab A-2, ¶ 16).

27. A true copy of the "Report on the On-Side Investigation of the Participation of Private School Children in Title I, ESEA, in Jefferson City, Kansas City, St. Louis, and St. Joseph, Missouri, May 24-28, 1976," is part of Def. Exh. M.

II. *NEW YORK CITY'S TITLE I PROGRAM*

A. *Overview of the New York City Program*

28. The New York City Board of Education ("Board") is responsible for the largest program of remedial educational services under Title I in the United States. The Board has received $147,850,892 in Title I funds for the 1981-1982 school year, an amount that represents 63.32 percent of New York State's total Title I allocation for that year. Supplementary Affidavit of Lawrence F. Larkin ¶ 9. Of those Title I funds available to the Board for the 1981-1982 school year, $20,003,028, or 13.5 per-

cent, has been allocated for Title I services for nonpublic school students. *Id.* at ¶ 9.

29. For the 1981-1982 school year, a total of 302,382 public and nonpublic school students in New York City were eligible for Title I remedial services. Of that total, 40,120, or 13.2 percent, were enrolled in nonpublic schools. *Id.* at ¶ 9. Budget limitations, however, made it impossible to provide Title I remedial services to all of those eligible nonpublic school students. Of the total number of eligible nonpublic school students, approximately 21,000 were expected to receive Title I remedial services during the 1981-1982 school year. Those students attend 231 of the 993 nonpublic schools in New York City. *Id.* at ¶ 7.

30. The Board's approved Title I program plan provides five types of remedial educational programs to qualified nonpublic school students. Those five programs are as follows: a Corrective Reading Program, a Reading Skills Program, a Corrective Mathematics Program, an English as a Second Language Program, and a Clinical and Guidance Program. Def. Exh. U (Tab A-4, ¶ 15). Those remedial services are comparable to those provided for qualified public school students in New York City.

B. *New York City's Title I Organization*

31. The Board is the designated local educational agency in New York City and, as such, has ultimate responsibility for the New York City program. Def. Exh. U (Tab A-4, ¶ 14). The Board's principal Title I functions have been to establish general policies and priorities for the operation of the program. The Board thus has approved the method for identifying low-income and educationally disadvantaged children, the annual Title I application and program plan submitted to the New York Education Department, the allocation of funds between the public and nonpublic school programs, and personnel policies. Def. Exh. U (Tabs A-3 and A-4, ¶ 26).

32. Responsibility for implementing and monitoring the New York Title I program rests with the Chancellor of the Board of Education, Frank J. Macchiarola, who is a defendant in this action. Overall administration of the Title I program has been delegated to the Board's Office of Funded Programs, which coordinates most non-tax levy, reimbursable programs of the Board. Perry Davis is the Acting Director of the Office of Funded Programs. Def. Exh. U (Tab A-4, ¶ 27).

33. Direct supervision of the Title I program for nonpublic school students throughout New York City is the responsibility of the Office of Special Projects. The Director of that office is Lawrence F. Larkin. That agency of the Board employs teachers and other professionals to provide Title I remedial services to nonpublic school students, develops the guidelines and procedures for implementing those Title I remedial services, assigns teachers and other professionals to provide services to nonpublic school students, exercises sole supervision over the teachers and other professionals, and handles all other aspects of the administration of the nonpublic school Title I program. *See generally* Def. Exh. U (Tab A-4).

34. In carrying out its administrative responsibilities, the Office of Special Projects coordinates its activities with several other departments within the Board. For example, the Bureau of Supplies orders and distributes instructional materials and other supplies required by nonpublic school Title I teachers and other professionals. The Office of Business and Administration establishes regulations and procedures for fiscal control and authorized expenditure of funds And the Division of Personnel screens applicants for all teaching and supervisory positions in the nonpublic school Title I program. Def. Exh. U (Tab A-4, ¶ 29).

C. *Determination of Eligible Students*

35. Consistent with the Act and the applicable Title I regulations, the Board has developed procedures for

determining which public and nonpublic school students qualify for Title I remedial services. Two factors are taken into account in the eligibility determination: low income and demonstrated educational deprivation. Def. Exh. U (Tab A-4, ¶ 17).

36. The first of those requirements—economic disadvantage—is satisfied if a student lives in a "target public school attendance area" with a high concentration of children from low-income families. Def. Exh. U (Tab A-4, ¶ 18). In New York City, that determination is made annually on the basis of whether a public school attendance area—elementary, intermediate or high school—has a percentage of school-age children living at or below the poverty level that is the same as or greater than the city-wide percentage of such children. *Id.* The city-wide poverty percentage is determined by a two-step process.

(a) First, the Board determines the total number of New York City children, ages 5 through 17, who are carried on the rolls of the Aid to Families with Dependent Children ("AFDC") program. To be eligible for AFDC assistance, a New York City family of four must have an annual income of less than $5,712. The AFDC total is then weighted as 60 percent. To this figure is added the total number of New York City children who participate in the federal free lunch program, weighted at 40 percent. Eligibility for this aid program is based on a sliding scale of family income and family size. Weighted figures are used in an attempt to reduce duplication in the calculation of poverty.

(b) Second, the Board devises the sums of the weighted AFDC and federal free lunch program totals by the total number of New York City public school children. The resulting figure is the city-wide target attendance area low-income percentage. Def. Exh. U (Tab A-4, ¶ 19).

37. For the 1981-1982 school year, the city-wide cut-off poverty percentage was 45.76 percent. That figure was arrived at by the following computation:

$$\frac{326{,}014 \times 60\% + 521{,}867 \times 40\%}{883{,}568} = \frac{404{,}354}{883{,}568} = 45.76\%$$

Thus, any public school attendance area which had a poverty percentage equal to or higher than 45.76 percent was designated as an ESEA Title I target attendance area. Supplementary Affidavit of Lawrence F. Larkin ¶ 11.

38. The procedure for determining the poverty percentage for individual school attendance areas is identical to that used in computing the city-wide poverty percentage. The sum of the weighted AFDC and federal free lunch program totals is divided by the number of public school students on the register of the school. There are more than 900 public school attendance areas in New York City and, for the 1981-1982 school year, 561 of those areas were designated as Title I target attendance areas. *Id.* at ¶ 11.

39. Under the Board's guidelines, a student, whether he attends a public or a nonpublic school, must live within a target public school attendance area to satisfy the economic disadvantage criteria for Title I eligibility. That requirement is not satisfied if the student lives outside a target public school attendance area but attends a school within an adjacent target public school attendance area. Consequently, residency within a designated low-income neighborhood is an indispensable threshold eligibility requirement. For that reason, Title I remedial services follow the student, and eligibility for those services bears no relationship to the location of a school or whether a student attends a public or a nonpublic school. Def. Exh. U (Tab A-4, ¶ 22).

40. The second Title I eligibility requirement—educational deprivation—is based on a determination that a student is performing below a stipulated competency level on standardized tests in reading or shows other evidence of educational disadvantage. This condition applies equally to public and nonpublic school students. Un-

der the Board's procedures, a student must satisfy one of the three following criteria to be considered educationally deprived:

(a) a performance level below minimum competency in reading as measured by achievement under the 24th percentile on the New York State Pupil Evaluation Program tests or by the equivalent total reading score on the Metropolitan Achievement Test or Science Research Associates test;

(b) identification as non-English-speaking as determined by a ranking of "C" or below on the New York City Scale, "Rating Oral Language Ability"; or

(c) identification as a "handicapped child" according to the definition provided by the United States Commissioner of Education. Def. Exh. U (Tab A-4, ¶ 23).

41. Based on the dual eligibility criteria, a total of 302,382 public and nonpublic school students were eligible for Title I services during the 1981-1982 school year. Supplementary Affidavit of Lawrence F. Larkin ¶ 9. Under the New York City program, there are no exceptions to the rule that no public or nonpublic school student may receive Title I remedial services unless he meets both the poverty and learning disability requirements. The type of school attended by the student—whether public or nonpublic, church-related or non-church-related—is irrelevant in determining a student's entitlement to Title I services. Title I eligibility standards are religiously neutral. Def. Exh. U (Tab A-4, ¶ 25).

D. *Funding New York City's Title I Program*

42. New York City receives an annual allocation of Title I funds from the New York State Education Department on the basis of a county-by-county calculation of the number of eligible children below the poverty level, plus other eligible children in institutions and foster homes. To determine New York City's share of the Title I funds allotted to the State, the State Educa-

tion Department uses the census count of low-income children and the AFDC program rosters of the New York City Department of Social Services. To arrive at the *per capita* share, the State Education Department divides the number of eligible children in the City into the State's overall allocation from the United States Office of Education. Def. Exh. U (Tab A-4, ¶ 30).

43. To meet its obligation to provide equitable and comparable Title I services to nonpublic school students, the Board allocates available Title I funds between public and nonpublic school children according to a *per capita* formula based on the total number of public and nonpublic school students eligible for Title I services. The amount of Title I funds allocated to nonpublic school students is based only on the percentage of those students who meet the statutory qualifications of economic and educational disadvantage and not on the total number of students enrolled in nonpublic schools in New York City. Def. Exh. U (Tab A-4, ¶ 33).

44. Although all nonpublic school students who are statutorily eligible to participate in the program are counted in the allocation of Title I funds between public and nonpublic school students, budgetary and logistical problems make it impossible to provide Title I services to all of those eligible nonpublic school students. Similar problems make it impossible to provide Title I remedial services to all eligible public school students. However, the amount of money allocated by the Board for each eligible public and nonpublic school student is equivalent. Def. Exh. U (Tab A-4, ¶¶ 34-35, 38).

45. The initial determination of how many of the eligible nonpublic school students will receive Title I remedial services is based on the number of teachers and other professionals who can be hired from available funds. Determining which of the eligible students receive the services then depends on the number of eligible students in a particular school and the administrative feasibility of assigning one or more teachers or professionals to that school. Def. Exh. U (Tab A-4, ¶ 35).

46. The average salary and benefits paid to teachers assigned to the nonpublic school Title I program for the 1981-1982 school year is $37,921. Supplementary Affidavit of Lawrence F. Larkin ¶ 8. Eight years ago, when large numbers of part-time teachers were employed, the average cost was $12,000. The number of Title I professionals assigned to the nonpublic school Title I program has decreased from approximatley 700 to 532 during those eight years. *Id.*; Def. Exh. U (Tab A-4, ¶ 37).

E. *Available Title I Services*

47. Consistent with the statutory and regulatory scheme of Title I, no public funds are disbursed to nonpublic schools under the New York City program. Rather, the Board provides five types of remedial services to nonpublic school students who satisfy Title I eligibility criteria. The services provided are remedial reading, a reading skills center, remedial mathematics, English as a second language, and clinical and guidance services. Def. Exh. U (Tab A-4, ¶ 39). Those services are provided by teachers and support professionals who are employees of the Board and subject solely to the supervision and control of the Board. *Id.* at ¶ 52.

48. In determining the types of remedial services to be provided to nonpublic school students under Title I, the Board has been guided by the statutory requirement that those services supplement, and not supplant, instruction and instructional services already being provided by the nonpublic schools themselves. Thus, in a 1966 resolution, the Board decided against providing speech improvement and library services for nonpublic school students under Title I because those services might be construed as being outside of the limited area of remedial and therapeutic services and might constitute services to institutions rather than to children. Def. Exh. L. As a result, no form of remedial services for nonpublic school students under Title I has been provided until a determination has been made that the particular services are

not being provided by the nonpublic schools. Def. Exh. U (Tab A-4, ¶ 40).

49. With the exception of the clinical and guidance program, the several remedial programs available to nonpublic school students are designed to provide instructional services by specially trained remedial teachers to poor and educationally disadvantaged children to assist them in improving their skills in the English language, reading and mathematics.

(a) The remedial reading program is designed to supplement the students' regular reading program and to raise the achievement levels of students in grades one through twelve who are reading one or more years below their grade level.

(b) The reading skills center program provides more intensive remedial reading instruction for students in grades four through eight whose reading achievement levels are as much as five years below grade level.

(c) The remedial mathematics program offers remedial instruction to students in grades one through twelve whose scores on standardized tests show them to be six months or more below grade level in mathematics.

(d) The English as a second language program is designed primarily for very young children or students who have recently arrived in the United States. That program provides basic instruction in the English language, with emphasis on oral proficiency, to enable the students to achieve the competency and fluency in the English language which is necessary for them to participate effectively in regular instructional programs. Def. Exh. U (Tab A-4, ¶¶ 42-46).

50. The clinical and guidance program involves support services by guidance counselors, school psychologists, social workers and psychiatrists. The support services are available only to students actually enrolled in Title I instructional programs. The clinical and guidance program is designed to enhance student achievement in the Title I instructional programs by providing diagnosis and

treatment for those students who, because of emotional and related problems, are not making expected progress in the remedial instruction programs. The success of this support program is evaluated in terms of whether students perform better in the Title I instructional programs. Def. Exh. U (Tab A-4, ¶ 47).

51. The Title I instructional services are generally provided to groups of about 10 students with an emphasis on individualized instruction. The classes meet at least once a week and, in cases of serious learning deficiencies, they meet as often as five times per week. These remedial services are designed primarily to reach children in grades one through six, but students in the higher grades with significant learning difficulties will be provided services if teachers are available. A Title I teacher ordinarily works with no more than 100 students during a five-day work week. Def. Exh. U (Tab A-4, ¶¶ 49-50). The affidavits of 29 Title I teachers and their supervisors describe the Title I instructional programs in considerable detail. *See* Def. Exh. U (Tabs A-5 to A-32).

52. The clinical and guidance professionals provide diagnostic testing, consultation and counseling services on an individual basis. Guidance counselors will occasionally provide services in group sessions when children in the group are experiencing common problems. The affidavits of several clinical and guidance professionals and their supervisors provide a detailed description of the types of services they provide to students in nonpublic school Title I instructional programs. *See* Def. Exh. U (Tabs A-33 to A-46).

F. *Hiring and Assignment Policies*

53. The teachers and other professionals who provide Title I remedial services to nonpublic school students are regular salaried employees of the Board. In all respects, they are similar to their counterparts teaching in regular classrooms or Title I programs in the public schools. All

teachers and other professionals employed by the Board, whether they are assigned to the nonpublic school Title I program or to public school programs, are subject to the provisions of the employment contract negotiated and executed by the Board and the United Federation of Teachers, must have an appropriate license from the Board, and are subject to the sole control and supervision of the Board. The Board's Division of Personnel is responsible for hiring and assigning teachers and other professionals to the nonpublic school Title I program. *See generally* Def. Exh. U (Tab A-3).

54. When the Title I program was first implemented, New York City was experiencing a shortage of qualified teachers. To avoid reassigning teachers from the public schools, the Board adopted a policy in 1966 of appointing only substitute teachers to the nonpublic school Title I program. That preference for the substitute teachers continued until September 1975, when New York's fiscal crisis drastically altered the assignment procedures for all teachers in the New York City public school system. Def. Exh. U (Tab A-3, ¶¶ 29-35).

55. Because of the fiscal crisis, the Board laid off some 20,000 persons, including 9,000 regularly appointed teachers and supervisors. Under the Board's contract with the United Federation of Teachers, the Board was required to offer available teaching positions to those regularly appointed teachers who had the most seniority. Those with less seniority were "excessed" and placed on a list of qualified and available teachers, ranked according to their seniority. Further layoffs in September 1976 added to the number of persons on the "excess" list. As new teaching positions became available after the "excess" list was established, those positions were offered to the teachers on the list with the most seniority. Most appointments of teachers to the nonpublic school Title I program were made from the "excess" list. After September 1978, teachers have been appointed to that program based on

their seniority on standard eligibility lists. Def. Exh. U (Tab A-3, ¶¶ 31-37).

56. Teachers and other professionals referred to the nonpublic school Title I program by the Division of Personnel are interviewed by the coordinator of the particular remedial program in which vacancies exist. Assignment to the nonpublic school Title I program is purely voluntary. If, for any reason, a teacher prefers not to work in a nonpublic school setting, he may refuse appointment to the program and not lose his seniority position on existing eligibility lists. Def. Exh. U (Tab A-4, ¶ 54).

57. The data collected by the Division of Personnel on teachers working in the New York City school system or applicants for positions in the system does not include any information concerning a person's religious affiliation. Def. Exh. U (Tab A-3, ¶ 37). The coordinators who interview persons referred to the nonpublic school Title I program make no inquiry concerning the person's religious affiliation or beliefs during the interview. For those reasons, the religious affiliation of a teacher, or the lack of any such religious affiliation, has no bearing on the decision to appoint the teacher to the nonpublic school Title I program or on the assignment of teachers and other professionals to particular nonpublic schools whose students receive Title I remedial services. Def. Exh. U (Tab A-4, ¶¶ 55-56).

58. Once a teacher or other professional is appointed to the nonpublic school Title I program, the determination of which nonpublic schools the teacher or other professional will work in is made solely by the administrators of the Bureau of Nonpublic School Reimbursable Services. Nonpublic school officials have no voice in the initial assignment of a Title I teacher or other professional. There is no known instance of any non-public school principal requesting or refusing the initial assignment of a Title I teacher or other professional on religious grounds or for any other reason. Def. Exh. U (Tab A-4, ¶ 56).

59. The administrators of the Bureau of Nonpublic School Reimbursable Services are solely responsible for decisions involving the reassignment, transfer, discipline or discharge of Title I teachers and other professionals. No reassignments or transfers will be made during a school year. There is no known instance of any nonpublic school official requesting the reassignment or transfer of a Title I teacher or other professional on religious grounds. No teacher or other professional has sought reassignment to a different nonpublic school or a transfer out of the nonpublic school Title I program for religious reasons. Def. Exh. U (Tab A-4, ¶ 57).

60. The amount of time that a particular Title I teacher or other professional will spend at any one nonpublic school is determined by the number of students at that school who are eligible for and in need of particular remedial services. Def. Exh. U (Tab A-4, ¶ 58). The vast majority of Title I teachers and other professionals are itinerant. During the 1981-1982 school year, approximately 78 percent of all Title I teachers and other professionals spent less than five days a week at the same nonpublic school and worked in more than one nonpublic school. Children in 180 of the 231 nonpublic schools with Title I services received those services from itinerant teachers or support professionals. All social workers, psychologists and psychiatrists in the nonpublic school Title I program are itinerant. Supplementary Affidavit of Lawrence F. Larkin ¶ 8.

61. Although the Board maintains no record of the religious affiliations of the teachers and other professionals assigned to the nonpublic school Title I program, the affidavits of Title I teachers demonstrate that the vast majority of them work in nonpublic schools with religious affiliations different from their own. Def. Exh. U (Tabs A-7 to A-15, A-17 and A-18, A-20 to A-26, A-28 to A-32, A-36 to A-46). A total of 73.5 percent of those persons are of a different religious faith than the schools to which they were assigned, and another 17.7 percent

work in at least one nonpublic school with religious affiliations different from their own.

G. *Restrictions on Teaching Activities*

62. Each teacher and support professional assigned to the nonpublic school Title I program is provided with a set of detailed written instructions by the Bureau of Nonpublic School Reimbursable Services which delineates his responsibilities in the program and the restrictions imposed on his activities. Def. Exh. U (Tab A-4, ¶¶ 28, 62). Those written guidelines are supplemented regularly by oral instructions provided during regular in-service training programs. *Id.* at ¶ 63. The restrictions set forth in those written and oral instructions are consistent with the restrictions set forth in the Title I regulations issued by the Office of Education. *Id.* at ¶ 28. Copies of the written guidelines given to Title I teachers are marked as Def. Exhs. D, E and F.

63. The written and oral instructions emphasize the independence of Title I teachers and other professionals from nonpublic school authorities. Among other things, those instructions stress:

(a) Title I teachers and other professionals are accountable only to their Title I supervisors and are not subject to the supervision of any nonpublic school officials. *E.g.*, Def. Exh. F, p. 136; Def. Exh. U (Tabs A-8, ¶ 8; A-40, ¶ 9).

(b) Title I teachers and other professionals are assigned to a nonpublic school only to provide services to those students who meet the Title I eligibility criteria of economic and educational disadvantage. *E.g.*, Def. Exh. F, p. 130; Def. Exh. U (Tabs A-14, ¶ 9; A-28, ¶ 8).

(c) The Title I teachers and other professionals, while they may consult with nonpublic school teachers and administrators on the educational needs of eligible Title I students, are solely responsible for the selection of stu-

dents who participate in the program. *E.g.*, Def. Exh. F, pp. 107-08; Def. Exh. U (Tabs A-11, ¶ 11; A-21, ¶ 12).

(d) Title I teachers and other professionals must administer their own standardized tests to each child tentatively selected to receive services, and not rely on tests administered by the nonpublic schools, to assure that the students finally selected meet the requirement of educational deprivation. *E.g.*, Def. Exh. F, pp. 210-19.

(e) Title I teachers and other professionals must take all necessary steps to assure that materials and equipment provided them for their Title I activities are used only in connection with the Title I program and are not diverted for use in the regular instructional program of the nonpublic school. *E.g.*, Def. Exh. F, p. 3; Def. Exh. U (Tabs A-9, ¶ 9; A-20, ¶ 8).

(f) Title I teachers and other professionals are not to engage in team-teaching or any other cooperative instructional activities with nonpublic school teachers. *E.g.*, Def. Exh. F, p. 135; Def. Exh. U (Tabs A-11, ¶ 17, A-17, ¶ 19).

(g) Title I teachers and other professionals are not to become involved in any way with the religious activities of the nonpublic schools and are not to introduce any religious matter into their teaching. Def. Exh. U (Tab A-4, ¶ 69).

64. An effective remedial educational program requires that the remedial teacher be aware of a student's response to his total educational environment. Title I teachers work with their students in groups of 10 or less, an educational setting which is quite different from the students' normal classroom environment. To understand how the student responds in the normal classroom environment, therefore, it is necessary for the Title I teacher to confer with the regular classroom teachers of the nonpublic schools concerning the students' needs and progress in that classroom environment. Such consultations are essential to an effective remedial education

program. *See, eg.*, Def. Exh. F, pp. 1-3. However, the Title I teachers are instructed to confine those consultations with regular classroom teachers to mutual professional concerns about the students' educational needs and not to engage in any discussion of matters of a religious nature. *E.g.*, Def. Exh. U (Tabs A-4, ¶¶ 68-69, 71; A-14, ¶ 16; A-36, ¶ 19).

65. There is no known instance of any Title I teacher or other professional becoming involved in the religious activities of nonpublic schools, introducing religious topics into his remedial instruction or counseling activities, or being pressured by nonpublic school principals or teachers to violate the explicit restrictions on the total separation of the purely secular Title I program and the religious functions of the nonpublic schools. The sole concern of the teachers and other professionals assigned to the nonpublic school Title I program is to provide a program of remedial instruction and services which is professionally comparable to that provided to students in the public schools of New York City. *See, e.g.*, Def. Exh. U (Tabs A-4, ¶ 70; A-25, ¶ 15; A-36, ¶ 22); Supplementary Affidavit of Lawrence F. Larkin ¶ 5.

H. *Supervision of Title I Professionals*

66. The Bureau of Nonpublic School Reimbursable Services has developed a comprehensive program of supervising, monitoring and evaluating the nonpublic school Title I program to ensure that Title I teachers and support professionals assigned to the nonpublic school program provide a quality program of remedial services and comply with all of the guidelines for that program, including the restrictions on their activities. Def. Exh. U (Tab A-4, ¶ 73).

67. Program supervision is the responsibility of the coordinators and supervisors of each of the five components of the nonpublic school Title I program. Def. Exh. U (Tabs A-4, ¶ 74; A-5, A-6, A-16, A-19, A-27, A-33, A-34, A-35).

68. The field supervisors serve essentially as itinerant evaluators and instructors of Title I teachers and other professionals at the nonpublic schools to which they have been assigned. A field supervisor is ordinarily responsible for 22 Title I teachers and attempts to make at least one unannounced visit to each teacher each month. Those visits will be more frequent for those teachers who are new to the program. *E.g.*, Def. Exh. U (Tabs A-4, ¶ 75; A-6).

69. During the unannounced visits, field supervisors evaluate the teachers' classroom performance, paying particular attention to the teachers' mastery of innovative remedial teaching techniques and familiarity with new materials and equipment. The field supervisors and teachers also discuss the problems and progress of particular students and the best way to deal with particular learning disabilities. This relationship between field supervisors and Title I teachers is highly professional. *E.g.*, Def. Exh. U (Tabs A-4, ¶¶ 76-78; A-6).

70. While the primary purpose of the field visits is to evaluate a teacher's performance and to provide an opportunity for consultation among peers, field supervisors are trained to be sensitive to the need for strict compliance by Title I teachers with those restrictions which are designed to achieve a total separation of Title I activities from the regular instructional programs of the nonpublic schools. Def. Exh. U (Tab A-4, ¶ 78). There is no known instance of Title I teachers and support professionals breaching those restrictions. *See generally* Def. Exh. U (Tabs A-5 to A-46); Supplementary Affidavit of Lawrence F. Larkin ¶ 5.

71. The affidavits of Title I teachers and support professionals uniformly attest to the fact that they are subject solely to the supervision of employees of the Board working in the nonpublic school Title I program. None has ever been subjected to any form of supervision by any nonpublic school employees. Def. Exh. U (Tabs

A-7 to A-15, A-17 and A-18, A-20 to A-26, A-28 to A-32, A-36 to A-46).

72. Program coordinators, who report directly to the Director of the Bureau of Nonpublic School Reimbursable Services, oversee the activities of the field supervisors. The coordinators are responsible for enforcing the general guidelines applicable to the nonpublic school Title I program and for ensuring that the program objectives are being met by the teachers under their direction. Coordinators will make occasional unannounced field visits to observe Title I teachers in the nonpublic schools. However, one of their principal methods of carrying out their responsibilities is through monthly in-service training sessions. Those sessions are frequently held on days when the public schools are in session but when the nonpublic schools have a religious holiday. The in-service training sessions permit the coordinators to review new techniques of remedial education and to review on a regular basis the guidelines for and restrictions on the nonpublic school Title I program. Def. Exh. U (Tabs A-4, ¶¶ 79-81; A-5, A-16, A-19, A-27, A-33, A-34).

73. Monitoring of the nonpublic school Title I program also is a function of persons outside of the supervision and control of the Bureau of Nonpublic School Reimbursable Services. For example, representatives of Chancellor Macchiarola's Monitoring Task Force and the New York State Education Department will periodically make unannounced visits to Title I classrooms to monitor the extent to which the program goals stated in the annual written Title I plan are being achieved. In addition, representatives from the United States Office of Education from time to time make inspection visits to the Title I classrooms. These monitoring activities provide an additional means for assuring that Title I teachers and other professionals are complying with the program guidelines and restrictions. Def. Exh. U (Tab A-4, ¶ 82).

74. Finally, the Board's guidelines require that an independent professional evaluator be employed annually to

review each of the Title I services provided to nonpublic school students. The evaluators examine the operation of the program and review test results to determine the effectiveness of the program in helping children to overcome learning disabilities. As part of their review, the evaluators visit Title I classrooms to observe how they are conducted. During the entire history of the nonpublic school Title I program, no evaluation report has contained any suggestion that Title I teachers deviate from the restrictions on their teaching activities or engage in any form of religious activity. Def. Exh. U (Tab A-4, ¶¶ 83-85); Supplementary Affidavit of Lawrence F. Larkin ¶ 5. The most recent written evaluation reports are for the 1979-80 school year and are included as Exhibits A to E to the Supplementary Affidavit of Lawrence F. Larkin.

I. *Title I Equipment and Materials*

75. A small portion of the budget for the nonpublic school Title I program is used annually to purchase materials and equipment necessary for teachers and other professionals to provide an effective remedial education program. For the 1981-1982 school year, only $570,344 was budgeted for materials and equipment. Supplementary Affidavit of Lawrence F. Larkin ¶ 10. The statute expressly contemplates that a portion of Title I funds will be used for such expenditures. 20 U.S.C.A. § 2734(a).

76. Some 95.3 percent of the instructional equipment and materials budget for the nonpublic school Title I program was allocated for the purchase of remedial teaching materials used by Title I instructors in their classrooms. These materials include dictionaries, consumable workbooks, textbooks, storybooks, teacher reference books, teaching games, standardized tests, measurement materials such as cuisenaire rods, rulers, and scales, capacity containers, metric learning tools, pictures, periodicals,

puppets, and audio-visual materials such as films, filmstrips, tapes, transparencies and recordings. Supplementary Affidavit of Lawrence F. Larkin ¶ 10.

77. The remainder of the equipment and materials budget was used for the purchase and rental of equipment. The equipment includes lockable storage and filing cabinets, desks, chairs, audio-visual equipment, tables, bookcases, duplicating machines, portable chalkboards, tape recorders, earphones, language master machines, and microfiche machines. Def. Exh. U (Tab A-4, ¶ 88).

78. All such materials and equipment are selected by the coordinators and supervisors of the five nonpublic school Title I programs on the standard requisition form of the Board's Bureau of Supplies. Def. Exh. G. The same procedures are used to obtain equipment and materials for regular public school classrooms and the public school Title I program. Def. Exh. U (Tab A-4, ¶ 89).

79. The various teaching materials used in the nonpublic school Title I program are selected on the basis of their relevance to the special needs of educationally disadvantaged or handicapped children. Def. Exh. U (Tab A-4, ¶ 90). Under the program guidelines, those materials must be appropriate for use in a remedial program and must not duplicate materials used in regular classroom instruction in the nonpublic schools. *E.g.*, Def. Exh. F, p. 136.

80. None of the teaching materials used in the nonpublic school Title I program has any religious content. In fact, many of those materials are designed to require a minimum of teacher direction to stimulate each student to work on his own toward improving his ability. The strictly secular content of the teaching materials and the emphasis on self-direction in the remedial programs virtually eliminates the possibility that religious content will find its way into the nonpublic school Title I program. Def. Exh. U (Tab A-4, ¶ 91).

81. Consistent with the Title I regulations, the Bureau of Nonpublic School Reimbursable Services has taken

steps to ensure that materials and equipment are used only in connection with the nonpublic school Title I program and will not inure to the benefit of nonpublic schools. *See* 34 C.F.R. § 76.661(c). All materials and equipment, at the time of acquisition, are clearly labeled as the property of the Board and as being for use in the Title I program. *See* Def. Exh. F, p. 351; Def. Exh. U (Tab A-4, ¶¶ 93-94). Title I teachers and other professionals are instructed that, when the materials and equipment are not in use, they should be locked in storage and filing cabinets. Def. Exh. U (Tab A-4, ¶ 95). Each item of equipment and material is subject to an annual inventory (*see* Def. Exh. J) and the Bureau of Nonpublic School Reimbursable Services makes follow-up inquiries when the inventory fails to account for specific items of equipment and materials. While the Board is empowered to terminate a Title I program at any nonpublic school at which Title I equipment and materials are diverted for use by the school in its regular instructional program, the Board has encountered no incident that has required it to exercise those powers. Def. Exh. U (Tab A-4, ¶ 98).

82. Under Title I and under regulations issued by the Office of Education and the Board, no Title I funds may be paid to nonpublic schools to finance salaries of regular classroom teachers or to construct nonpublic school facilities. 34 C.F.R. §§ 76.658, 76.622. The Board has consistently observed those restrictions. Def. Exh. U (Tab A-4, ¶ 99); Supplementary Affidavit of Lawrence F. Larkin ¶ 5.

J. *Title I Classrooms and Facilities*

83. Regulations issued by the United States Office of Education authorize the assignment of public school teachers to nonpublic schools "[t]o the extent necessary to provide equitable program benefits" to nonpublic school children. 34 C.F.R. § 76.659.

84. Pursuant to those regulations and for reasons explained more fully in paragraphs 100 through 109 below, the Board has determined as a matter of sound educational policy that Title I remedial and support services can be provided most effectively to eligible children only on the premises of the schools they regularly attend. For that reason, the Office of Special Projects, like its counterparts for public school children, assigns teachers to provide Title I services during regular school hours at the nonpublic schools attended by eligible students. Def. Exh. U (Tab A-4, ¶ 101).

85. Before the Office of Special Projects approves the assignment of Title I teachers or other professionals to a particular nonpublic school, an administrator of the Bureau visits the school to ensure that the facilities to be used for Title I instruction and support services meet all health and safety requirements of the Board. During those visits, the administrator informs the nonpublic school principal of all federal, state and local guidelines governing the Title I program, including the requirement that any room used for Title I instruction or support services be free of all religious symbols and artifacts. Def. Exh. U (Tab A-4, ¶ 102).

86. Nonpublic schools with children receiving Title I instructional services typically reserve a classroom for the exclusive use of Title I teachers. In those few nonpublic schools in which a Title I teacher spends five days a week, the Title I classroom is used only by that teacher. In the majority of the schools where several itinerant Title I teachers work from one to three days a week, the reserved classroom facilities are available for those teachers. Def. Exh. U (Tab A-4, ¶ 103).

87. With one exception, clinical and guidance professionals are itinerant, ordinarily spending only one or two days at any particular school. Those Title I staff members customarily use the nurse's room or a comparable facility at the nonpublic school. Those facilities are not used for any instructional purposes, and they provide

the necessary privacy for confidential discussions with students and parents. Def. Exh. U (Tab A-4, ¶ 104).

88. None of the nonpublic school facilities used for Title I remedial instruction or support services contains any religious statutes, symbols, pictures or artifacts. *E.g.*, Def. Exh. U (Tabs A-4, ¶ 105; A-10, ¶ 19; A-25, ¶ 21; A-31, ¶ 17). Those facilities are separate and distinct from the facilities used by the nonpublic schools for their own instructional activities. Typically, a Title I classroom has a hand-lettered sign on the door identifying it as a facility reserved for Title I remedial activities. *See, e.g.*, Def. Exh. F, p. 116. In effect, the Title I facility is a public school within the nonpublic school, unaffected by the fact that the nonpublic school may be sponsored by or affiliated with a religious denomination. Def. Exh. U (Tab A-4, ¶¶ 106-07).

K. *Administrative Contacts with Nonpublic Schools*

89. The day-to-day administration of the nonpublic school Title I program by the Office of Special Projects involves only routine communications with nonpublic school officials and does not involve the Office in the internal affairs of nonpublic schools. By the same token, those communications give nonpublic school authorities no control or authority over the internal decisions of the Office concerning the implementation of the nonpublic school Title I program. Def. Exh. U (Tab A-4, ¶ 115). The administrative relationships between the Bureau and nonpublic school officials fall into three general categories: disseminating information, processing requests for services, and resolving questions concerning the implementation of the program. *Id.* at ¶ 116.

90. To ensure that there will be full cooperation by nonpublic school officials, the Office of Special Projects makes it a practice to keep those authorites [sic] fully informed about the nonpublic school Title I program. In particular, the administrators of the Office disseminate

information to and hold orientation conferences for the nonpublic school principals about the following matters: the purpose of the Title I remedial education programs, the types of services available, the criteria for determining economic and educational disadvantage, considerations used in selecting those eligible students who receive services, the procedures for requesting services, the applicable guidelines for and restrictions on the program, and the policies and procedures for assigning Title I teachers and other professionals. Def. Exh. U (Tab A-4, ¶ 117). Most of that information is disseminated through conferences held at the Office, bulletins and newsletters sent by mail (see Def. Exh. L), and telephone calls between administrators of the Bureau and nonpublic school principals. Def. Exh. U (Tab A-4, ¶ 118).

91. The second type of administrative contact—processing requests for services—involves little more than a "paper relationship", in the sense that nonpublic school principals fill out, and employees of the Board review, two standardized forms. That process is substantially similar to that followed by public school principals in requesting Title I services for their students. Def. Exh. U (Tab A-4, ¶ 119).

92. Each spring the Board's Office of Educational Statistics sends to the principal of each of the 918 nonpublic schools in New York City a form entitled "Survey of E.S.E.A. Title I Eligible Non Public School Pupils." *See* Def. Exh. B. This form requests information concerning students' addresses, scores on standardized achievement tests and, in the case of handicapped children, the type of handicapping condition (such as mental retardation, visual impairment or deafness).

93. The Office of Educational Statistics uses the information on the survey forms to make a preliminary determination of which students are below the minimum competency level in their performance on standardized tests and who live in target public school attendance areas

with high concentrations of low-income residents. On the basis of those determinations, the Office of Educational Statistics prepares a roster of students who meet the threshhold [sic] eligibility requirements for Title I remedial services. A copy of those rosters is sent to the Bureau of Nonpublic School Services and nonpublic school principals. Def. Exh. U (Tab A-4, ¶ 121).

94. Those rosters permit the nonpublic school principals to complete a second form which is known as a "Request for ESEA Title I Central Remedial Services for Eligible Nonpublic School Pupils," and which is submitted to the Office of Special Projects. Def. Exh. C. These forms are submitted by the principals on behalf of students who are potential recipients of Title I remedial services and contain information about the extent of the students' performance below grade level in the areas of reading, mathematics and oral fluency in English. On the basis of that data, nonpublic school principals request a certain number of days per week of Title I remedial services in the five programs provided to nonpublic school students. Def. Exh. U (Tab A-4, ¶¶ 122-23).

95. After receiving the request forms from the nonpublic school principals, the Office of Special Projects allocates positions for teachers at the nonpublic schools on the basis of available funds, the total number of nonpublic school students who will actually receive services, and the administrative feasibility of assigning teachers or other professionals in light of the number of eligible participating students at particular nonpublic schools. Def. Exh. U (Tab A-4, ¶ 124).

96. The third type of administrative contact—resolving questions about program implementation—is primarily *ad hoc*. The questions directed to the Office of Special Projects most commonly relate to scheduling and related problems. Those questions never involve matters of a religious nature. Def. Exh. U (Tab A-4, ¶ 125).

97. In the course of these various administrative contacts between the administrators of the Office of Special

Projects and nonpublic school principals, the principals have occasionally criticized the Title I program. The most common criticisms have involved delays in implementing services at the beginning of a school year or delays in notifying the principals about the number of eligible students to whom the services will be provided in a particular year. None of these criticisms has ever involved allegations of interference by the Board or its personnel with the nonpublic schools' control over their internal affairs, curriculum, course content, or faculty qualifications or performance. Nor has there been any suggestion in those criticisms that the nonpublic schools were attempting to exercise any control over the nonpublic school Title I program or supervisory authority over teachers and other professionals assigned to that program. Def. Exh. U (Tab A-4, ¶ 114). Several principals of church-related schools at which Title I services are provided have submitted affidavits. Def. Exh. U (Tabs A-49 to A-54). In addition to giving a brief description of the schools, these affidavits describe the principals' perceptions of the Title I program as an independent form of secular remedial education for some of their students, as well as the relationship of their schools and themselves to the program and its administration.

98. The Office of Special Projects, as the agent of the Board responsible for implementing the nonpublic Title I program, is responsible for the welfare of all children participating in the program. On rare occasions, the Bureau has been required to exercise its power to terminate or suspend services to a small number of nonpublic schools which fail to comply with health and safety code requirements. In each instance that the power was exercised, the nonpublic school quickly remedied the problem and services were resumed. At no time has the Office terminated or suspended Title I services because of religious abuses or interference by nonpublic school officials with Title I teaching and supervisory activities. Def. Exh. U (Tab A-4, ¶¶ 126-27).

99. The experience with these various forms of administrative contacts between officials of the Board and administrators of nonpublic schools in New York City has confirmed the following observation by the United States Office of Education:

> "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." *United States Office of Education (USOE) Program Guide No. 44* (1968), *reproduced in Title I ESEA, Participation of Private School Children, A Handbook for State and Local Officials*, U.S. Department of Health, Education and Welfare, Publication No. (OE) 72-62, p. 8 (1971).

L. *Reasons for On-Premises Services*

100. The Board made the decision to provide Title I instructional and support services to nonpublic school students at their schools during regular school hours only after experimenting with alternative programs. During the first academic year that Title I funds were available to the Board, the Board attempted to provide services to nonpublic school students after regular school hours both at public schools and at nonpublic schools. The experiment, in the Board's view, was a total failure. Def. Exh. U (Tab A-4, ¶ 135).

101. Within a few months of the enactment of Title I, the Board authorized a pilot Title I program for nonpublic school students. Initially, students selected for participation in the program were required to travel to public schools after regular school hours to receive remedial services from regular public school employees. When attendance lagged in that program, the Board transferred some Title I services to nonpublic schools after regular school hours, shifting the burden of transportation to the public school teachers, while maintaining

other services at off-premises sites. Attendance was also poor after that change was made, and the Board found common problems in both alternatives. Def. Exh. U (Tab A-4, ¶¶ 136-37).

102. Because both the off-premises and on-premises programs were conducted at the end of the regular school day, both the students and teachers were tired. The students' fatigue made them far less receptive to the highly intensive nature of remedial instruction, and they failed to show noticeable improvement in the skills in which they were deficient. Moreover, there was justifiable parental concern about the safety of children traveling home after dark or in inclement weather during the late fall, winter and early spring months. Finally, communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic school students was virtually impossible after the regular nonpublic school day ended. Def. Exh. U (Tab A-4, ¶ 136).

103. The only other alternative to a program on the premises of nonpublic schools during the regular school day was to offer Title I services to nonpublic school students at public schools during the regular school day. However, under Article XI, Section 306 of the New York State Constitution, there were serious questions concerning whether nonpublic school students could participate with public school students in programs conducted on public school premises during regular school hours. Because of those legal problems and because poor attendance in the after-hours programs had demonstrated that nonpublic school students were not receiving Title I benefits comparable in scope and quality to those received by public school students, the Board adopted the only practical alternative—a program on the premises of nonpublic schools during regular school hours. Def. Exh. L.

104. On August 31, 1966, the Board adopted a resolution approving that new method of providing Title I services to nonpublic school students. The Board's resolution and accompanying statement recited many of the

problems that had been encountered with the after-hours program as the reason for the new program. For example, the Board stated:

> "The Board's own experience in giving instruction of this character has demonstrated that the after-school centers are not as well attended as they should be by the students who need the most help. Moreover, the Board has learned by experience that remedial instruction by teachers specially assigned for the purpose should, to be as effective as possible, be carried on in frequent consultation with the regular class-room teachers of the children in question. Frequently, also, the children's records need to be looked at. All this would be difficult to manage in after-school centers, particularly when conducted on school premises other than the children's regular schools." Def. Exh. L, p. 3.

These and other reasons given by the Board for the failure of the after-hours program are remarkably similar to the findings of the Office of Education investigation team that provided the factual basis for implementing the Title I "bypass" program in four cities in Missouri. *See* paragraphs 21-27, *supra.*

105. In adopting the program in providing Title I services on the premises of nonpublic schools during regular school hours, the Board was sensitive to the restrictions necessary to ensure the secular integrity of the Title I program. For that reason, the Board was careful in selecting the types of services to be provided to eligible nonpublic school children. The Board's statement accompanying its August 31, 1966, resolution stated:

> "The Board . . . will provide the following services for educationally disadvantaged children in nonpublic schools, on their premises, during the school day: remedial reading, remedial arithmetic, speech therapy, and guidance counseling. The instruction

> will be given by peripatetic teachers, who will go from one school to another during particular periods; no teacher will be so assigned without his consent. The instruction will not duplicate any of the regular class-room work of the schools involved. Speech improvement instruction, for example, as distinguished from speech therapy (for stammering and other speech impediments), has been eliminated from the proposals as being too close to regular class-room work. Library services for non-public schools have likewise been eliminated as being outside the limited areas of remedial and therapeutic, and as constituting services to institutions more directly than to children." Def. Exh. L, p. 3.

Those criteria established by the Board in 1966 for determining the appropriateness of providing particular forms of services under Title I to nonpublic school students have been followed subsequently when new programs have been added for nonpublic school students. Def. Exh. U (Tab A-4, ¶ 40).

106. The necessity of providing Title I services to nonpublic school students on the premises of their schools during school hours is attested to in the many affidavits of Title I teachers, administrators, and parents submitted with this Narrative Summary. Included among the several pedagogical and practical reasons for the view specified in these affidavits are the need for consultation between the Title I teacher and the student's regular classroom teacher, the problem of student fatigue, receptivity, and attendance with respect to an after-hours program, and the problem of student security. *See, e.g.*, Def. Exh. U (Tabs A-5, A-13, A-18, A-21, A-30, A-34, A-35).

107. During the 1977-1978 school year, the Bureau of Nonpublic School Reimbursable Services analyzed the costs that would be incurred if the Title I program for

nonpublic school students were to be conducted at sites other than the nonpublic schools. Def. Exh. N. That analysis revealed the following:

(a) Using a random sample of six community school districts with 6,852 of the 33,977 eligible nonpublic school students, during the school year the survey concluded that 63 percent of those students would have to be provided transportation from their nonpublic school to the nearest convenient public school site. The cost of that transportation would necessarily have to come from that portion of the budget for the nonpublic school Title I program currently devoted to instructional services. Def. Exh. U (Tab A-4, ¶ 147).

(b) The cost of transportation, plus other non-instructional costs that would be incurred by the off-premises program, would amount to more than $4.2 million, which, for the 1977-1978 school year, would have been more than 42 percent of the total budget for the nonpublic school Title I program. Def. Exh. N.

(c) Because the Board could not have allocated an additional $4.2 million for the nonpublic school Title I program, those additional costs would have been met by that portion of the budget now devoted to instructional services. To meet those additional costs would have required the elimination of 167 teaching positions and a corresponding number of supervisory and other administrative positions. Such a reduction in professional staff would have meant the elimination of services to 5,039 students, or 36 percent of those who received Title I remedial services during the 1977-1978 school year. Def. Exh. N; Def. Exh. U (Tab A-4, ¶ 153).

108. An off-premises program that incurred non-instructional costs of $4.2 million and eliminated services to more than 5,000 nonpublic school students would not have been a program providing benefits comparable to those provided in the program of Title I services available to public school students in New York City. Def. Exh. U (Tab A-1, ¶ 16).

109. The conclusions of the study conducted by the Bureau of Nonpublic School Reimbursable Services parallel the experience of St. Louis, Missouri, during the 1975-1976 school year when it provided Title I services to nonpublic school students at five central locations after regular school hours. Those five central locations offered instructional services to 1,600 eligible nonpublic school students attending 23 nonpublic schools. That St. Louis Title I program for nonpublic school students incurred non-instructional costs of $286,181 out of a total program budget of $675,690. The noninstructional costs represented 42.5 percent of the total budget. Def. Exh. U (Tab A-4, ¶¶ 148-50).

110. Thus, the Board's own experience with an after-hours program during the first year that Title I was in operation and the magnitude of non-instructional costs that would be incurred by any form of off-premises program today demonstrate that there is no alternative to the present program of providing Title I services to nonpublic school students on the premises of their schools during regular school hours that would be comparable to the Title I services available to public school students in New York City.

M. *Accomplishments of the Title I Program*

111. During the 16 years that Title I services have been available in New York City, tens of thousands of economically and educationally disadvantaged nonpublic school students have participated in the program. Despite limited funds and rising costs, the Board has consistently attempted to assure that nonpublic school students would derive benefits from the program comparable to those enjoyed by public school students with similar economic and educational handicaps. Def. Exh. U (Tab A-4, ¶ 130).

112. Annual reports submitted by independent evaluators who have assessed the Title I program for nonpublic school students have consistently found that stu-

dents participating in the program show measurable improvement in overcoming their learning disabilities. The following is a summary from the reports for the 1975-1976 school year, *see* Def. Exhs. O to S, which describe the accomplishments noted by the evaluators who reviewed the nonpublic school Title I program: [1]

a. In the remedial mathematics program, the evaluator concluded that "the program was highly successful, well-administered and well taught . . . . In all grade levels, the students manifested statistically significant gains of their mathematics scores over the predicted scores." For example, only 26.32 percent of the students passed one test before receiving Title I remedial mathematics instruction. At a later time, however, 85.96 percent received passing scores on the same test. Def. Exh. Q, pp. 18, 22.

b. The evaluator of the reading skills center program concluded that "statistically significant improvement in reading achievement as measured by the Stanford Diagnostic Reading Test was evidenced by participants . . . . The individualized, diagnostic-prescriptive approach has resulted in clear and significant improvement for severely disabled readers in grades four through eight." Def. Exh. p. [sic] pp. 6-7.

c. The evaluator of the English as a second language program found that program to be "highly successful" and noted that "[t]est results for [the 3,000] participating pupils demonstrated that students at all grade levels experienced statistically significant gains." Def. Exh. R, p. 22.

d. The regular remedial reading program, which enrolled the largest number of students, received high grades from the evaluator. The evaluator stated that "[t]he major program objective, significant improvement

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[1] The most recent reports, which cover the 1979-80 school year, are marked as Defendants' Supplementary Exhibits A to E to the Supplementary Affidavit of Lawrence F. Larkin.

of reading levels over expectation, is judged to be unequivocally successful." Def. Exh. O, p. 8. The evaluator noted that students in 13 of 19 of the components of the program that he reviewed showed improvement in their reading abilities "at better than one month of reading gain for each month of instruction." *Id.* One of the major conclusions of the evaluator was as follows:

> "Implementation of the program, assessed through field visits, revealed that the program is a firstrate corrective reading effort, operating close to general program objectives and standards. There is an emphasis on individual diagnosis that is followed through with a corresponding emphasis on individual and small group instruction. The program is characterized by the presence of excellent prescriptive teaching, and imaginative and consistent efforts at motivation. A wide variety of materials are available and are in use, in conjunction with a wide range of appropriate teaching methodologies. The program has achieved a high level of student interest and involvement." *Id.* at 15-16.

e. The evaluator of the clinical and guidance program found that program to be successful in helping the students improve their skills in the instructional programs by overcoming their behavior problems. Test scores measuring behavior improvement were "highly statistically and practically significant." Def. Exh. S, pp. 15-16.

113. Parents of nonpublic school students receiving Title I services also attest to the substantial accomplishments of the Title I program. The affidavits submitted by several parents describe their children's achievements as a result of their participation in one or more of the Title I remedial educational programs and state that they could not otherwise afford to provide their children with these services. Def. Exh. U (Tabs A-55 to A-58).

III. CHARACTERISTICS OF CHURCH-RELATED SCHOOLS IN NEW YORK CITY AT WHICH TITLE I SERVICES ARE PROVIDED

114. The vast majority of nonpublic school students in New York City who receive Title I remedial services attend schools that are affiliated with one of several religious denominations. Statistics compiled by the Board reveal that approximately 85 percent of nonpublic school students receiving Title I services attend Roman Catholic schools affiliated with the Archdiocese of New York or the Diocese of Brooklyn. Approximately eight percent of participating students attend Hebrew Day schools.

115. Affidavits submitted by administrators of Catholic and Hebrew Day schools which have Title I remedial programs on their premises demonstrate that those schools do not have the characteristics of "pervasively sectarian schools" that have been involved in earlier cases in which the Supreme Court has considered the constitutionality of educational aid programs. Def. Exh. U (Tabs A-47 to A-54).

116. Those affidavits show that religiously affiliated schools attended by approximately 95 percent of nonpublic school students receiving Title I services:

a. do not restrict in any way the admission of students on religious grounds [Def. Exh. U (Tabs A-47, ¶¶ 27-31; A-48, ¶¶ 20-25; A-53, ¶ 7, A-54, ¶ 7)];

b. do not restrict the hiring of teachers on religious grounds [Def. Exh. U (Tabs A-47, ¶¶ 32-35; A-53, ¶ 10; A-54, ¶ 9)];

c. offer separate programs of secular and religious instruction and do not place religious limitations on the content of the instruction offered [Def. Exh. U (Tabs A-47, ¶¶ 36-40; A-48, ¶¶ 26-29; A-50, ¶ 7; A-53, ¶¶ 8, 9; A-54, ¶ 8)];

d. do not make any effort to compel their students to obey the doctrines and dogmas of the sponsoring church [Def. Exh. U (Tabs A-47, ¶¶ 21-23; A-48 ¶¶ 35-27 [sic])]; and

e. do not make any effort to inculcate students with or impose upon those students the religious values of the sponsoring church [Def. Exh. U (Tabs A-47, ¶¶ 24-26; A-48, ¶ 30)].

117. Those affidavits of the nonpublic school administrators also reveal that they consider the Title I remedial services offered to eligible students on their premises to be a program that is separate and distinct from the regular program of instruction sponsored by the nonpublic schools. Def. Exh. U (Tabs A-49, ¶¶ 12-19; A-50, ¶¶ 11-18; A-51, ¶¶ 12-20; A-52, ¶¶ 11-16; A-53, ¶¶ 15-21; A-54, ¶¶ 14-21).

118. Finally, the affidavits of the Hebrew Day School administrators disclose that the regular school day at those schools is much longer than normal and that a program of Title I remedial services offered at the end of that long school day would not be a practical alternative for students in those schools. Def. Exh. U (Tabs A-53, ¶¶ 8, 23; A-54, ¶¶ 8, 23).

Respectfully submitted,

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Dated: May 12, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1750

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS,
INTERVENOR-DEFENDANTS

PLAINTIFFS' COUNTER-STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Introduction

Plaintiffs have reviewed defendants' prolix statement of material facts not in dispute. We believe that the most efficient and convenient way for us to present out counter-statement is to respond to the defendants' statement, paragraph by paragraph.

1-15. Not in dispute.

16. Plaintiffs object to and dispute the allegations in paragraph 16 of defendants' statement through the word "institutions' [sic] in the fourth line of the paragraph as

argumentative, conclusory and unnecessary to the allegations in the balance of the paragraph, which are not in dispute.

17. Plaintiffs object to and dispute the allegations in the opening sub-paragraph of paragraph 17 of defendants' statement through the word "setting" in the second line of the paragraph, for the reasons stated in paragraph 16 above.

18. Plaintiff's object to and dispute the allegations in the first sentence of paragraph 18 of defendants' statement unless it is construed to mean that those allegations are requirements of the applicable statute and regulations, which the parenthetical references at the end of the sentence suggest.

19. Not in dispute.

21-27. Plaintiffs object to and dispute the allegations in paragraphs 21-27 of defendants' statement as irrelevant to the constitutional issue in this case, argumentative in nature, and, in the case of paragraph 27, improperly incorporating an entire report in a statement of facts not in dispute.

28-47. Not in dispute.

48. Plaintiffs object to and dispute the allegations in the first sentence of paragraph 48 of defendants' statement, to the word "Thus" at the beginning of the second sentence of the paragraph, and to the words "As a result" at the beginning of the third sentence of the paragraph, as being argumentative, conclusory and unnecessary to the statement of facts in the second and third sentences, which are not in dispute.

49-51. Not in dispute.

52. Plaintiffs object to and dispute the allegations in the last sentence in paragraph 52 of defendants' statement as improperly incorporating several affidavits in a statement of facts not in dispute.

53-56. Not in dispute.

57. Plaintiffs object to and dispute the allegations in the last sentence of paragraph 57 of defendants' statement as argumentative and conclusory.

58. Plaintiffs object to and dispute the allegations in the last sentence of paragraph 58 of defendants' statement unless it is taken to mean that there is no *report* of the type of instance referred to in that sentence that has been officially made to the New York City Board of Education, which is the most that can be said on the subject with any claim to personal knowledge of the facts.

59. Plaintiffs object to and dispute the allegations in paragraph 59 of defendants' statement for the reasons stated in paragraph 58 above.

60. Not in dispute.

61. Plaintiffs object to and dispute the allegations in paragraph 61 of defendants' statement as being argumentative, conclusory and patently unverifiable.

62-64. Not in dispute.

65. Plaintiffs object to and dispute the allegations in the first sentence of paragraph 65 of defendants' statement for the reasons set forth in paragraph 58 above. We object to and dispute the allegations in the second sentence of the same paragraph as argumentative, conclusory and unverifiable.

66-69. Not in dispute.

70. Plaintiffs object to and dispute the allegations [sic] the last sentence of paragraph 70 of defendants' statement for the reasons set forth in paragraph 58 above.

71. Plaintiffs object to and dispute the allegations in paragraph 71 of defendants' statement as improperly incorporating affidavits in a statement of facts not in dispute.

72-79. Not in dispute.

80. Plaintiffs object to and dispute the allegations in the last sentence of paragraph 80 of defendants' statement as argumentative, conclusory and a non-sequitur.

81. Plaintiffs object to and dispute the allegations in the first sentence of paragraph 81 of defendants' statement as vague, argumentative, conclusory, and unnecessary to the allegations in the balance of the paragraph,

which are not in dispute. We dispute the allegations in the last sentence of the same paragraph unless it is taken to mean that the Board has encountered no incident that *it has understood* to require it to exercise its powers.

82-82. [sic] Not in dispute.

84. Plaintiffs object to the allegations in paragraph 84 of defendants' statement as irrelevant to the constitutional issue in this case.

85-87. Not in dispute.

88. Plaintiffs object to and dispute the allegations in the second and fourth sentences of paragraph 88 of defendants' sentences of paragraph 88 of defendants' statement as contrary to the facts reasonably inferred from the record and by the use of common sense.

89-96. Not in dispute.

97. Plaintiffs object to and dispute the allegations in the last two sentences in paragraph 97 of defendants' statement as argumentative, conclusory and improperly incorporating several affidavits in a statement of facts not in dispute.

98. Not in dispute.

99. Plaintiffs object to and dispute the allegations in paragraph 99 of defendants' statement as argumentative, conclusory and improperly incorporating in a statement of facts not in dispute an opinion of an interest party on a material issue of fact.

100-110. Plaintiffs object to and dispute the allegations in paragraphs 100 to 113 of defendants' statement as irrelevant to the constitutional issue in this case.

114. Not in dispute.

115-117. Plaintiffs object to and dispute the allegations in paragraphs 115 to 117 of defendants' statement as contrary to the facts of record and as improperly incorporating affidavits in a statement of facts not in dispute.

118. Plaintiffs object to and dispute the allegations of paragraph 118 of defendants' statement as irrelevant

to the constitutional issue in this case and as improperly incorporating affidavits in a statement of facts not in dispute.

Dated: New York, New York
May 28, 1982

Respectfully submitted,

/s/ Stanley Geller
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and FRANK J. MACCHIAROLA, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

—and—

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, ET. AL., INTERVENOR-DEFENDANTS

SUPPLEMENTAL AFFIDAVIT OF LAWRENCE F. LARKIN

LAWRENCE F. LARKIN, being duly sworn, says:

1. I am the Director of the Office of Special Projects of the New York City Board of Education. I make this affidavit in opposition to plaintiffs' motion for summary judgment and in support of defendants' cross-motion for summary judgment and to update the affidavit sworn to by me on April 17, 1979 and submitted to the court in the case entitled *National Coalition for Public Education and Religious Liberty* v. *California, et. al.*, 489 F. Supp.

1248 (S.D.N.Y., 1980). The April 17, 1979 affidavit is being submitted to this Court along with the rest of the documentary and testimonial record in the above case pursuant to a stipulation so ordered by this Court on March 12, 1982.

2. In 1979, my title was Director of the Bureau of Nonpublic School Reimbursable Services for the New York City Board of Education. I was responsible for overall supervision and management of the compensatory education services provided to New York City nonpublic school students by the New York City Board of Education under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) ("Title I"). In my new position, I continue to bear day to day administrative responsibility for the City's nonpublic school Title I program as well as supervising additional special projects for the Board of Education.

3. I have carefully reviewed my affidavit of April 17, 1979. The Title I nonpublic school program described in detail in that affidavit is the same program which I administer today.

4. In the last three years there have been no changes in any aspect of the program including the type of services available, the Board's hiring and assignment policies, the guidelines for teachers, the method of supervision, the use of Title I equipment and materials, and the administration of the program. The only changes which have occurred are in the numbers of children, teachers and schools participating in the program and in the budget. These updated statistics have been incorporated into defendants' 9 (g) statement, "Defendants' Joint Statement of Material Facts not in Dispute." They will be described below.

5. Throughout the affidavit of April 17, 1979, I stated that in my eight years as Director of the nonpublic school Title I Program, I knew of no instance where religion played any role whatsoever in any aspect of the program. Today, three years later, I can again state that the Title I program is religiously neutral; I know of no instance in

which the decision to hire or reject a prospective teacher for the program was in any way influenced by the applicant's religious affiliation or beliefs; I know of no instance of any member of the Title I nonpublic school program staff becoming involved with the religious activities of the nonpublic schools, engaging in religious indoctrination in their teaching or counseling, or being pressured by nonpublic school principals or teachers to violate the explicit restrictions on the complete separation between purely secular Title I operations and the religious functions of the nonpublic school; I know of no evaluation report which has ever made a finding that Title I teachers have deviated from the explicit restrictions on their teaching activities; I have discovered no pattern of abuses of the restrictions placed on the use of Title I property; I know of no Title I room used for remedial instruction or support services at any nonpublic school which contains any religious statutes, symbols, pictures or artifacts; at no time have I been required to halt Title I services because of religious abuses or interference by nonpublic school officials with Title I teaching or supervisory activities.

6. As I stated in April 1979, to the best of my knowledge the operation of the Title I program in the nonpublic schools is similar in all material respects to the Title I program conducted on the premises of the public schools of the City of New York.

7. The pertinent statistics for the nonpublic school Title I program for the 1981-82 school year are as follows: Title I services are being provided to approximately 21,000 children attending 231 nonpublic schools, 84% of which are affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn. An additional 8% of participating students attend Hebrew Day Schools.

8. There are 532 employees in the program providing the following services: Remedial Reading, Reading Skills Services, Remedial Mathematics, English as a Second

Language, Guidance, and Clinical. In the 1981-82 school year, 78% of Title I teachers are itinerant in the sense that they spend less than five days a week at the same nonpublic school. Thus, children in 180 of the 231 nonpublic schools with Title I services receive those services from itinerant teachers. The average cost of a New York City teacher assigned to the nonpublic school Title I program for 1981-82 is $37,921.

9. The total Title I nonpublic school allocation for the 1981-82 school year is $20,003,028 which represents 13.5% of the citywide allocation of $147,850,892. Of the 302,382 public and nonpublic school children eligible for Title I services during the 1981-82 school year, 40,120 or 13.2% attended 316 nonpublic schools. (Because of logistical and budgetary problems, services cannot be provided to all eligible children.)

10. Materials purchased for the Title I program in 1981-82 cost $570,344. Of the total budget for instructional materials, 95.3% was spent on remedial teaching materials.

11. During the 1981-82 school year, the number of areas classified as "target" public school attendance areas was 561. A child must live within a target public school attendance area to satisfy the initial low-income prerequisite for Title I eligibility. In 1981-82, a target public school attendance area was one in which the percentage of needy children in the area amounted to 45.76%.

12. I am submitting with this affidavit independent evaluations of the Title I nonpublic school program for the 1979-80 school year. See Defendants' Supplementary Exhibits A-E. These evaluations show the progress made by the children in the program in improving their performance on standardized tests measuring basic educational skills.

13. In the Corrective Mathematics program the evaluator concluded, "Analysis of the pre- and posttest data for corrective mathematics students indicates that the

program had significant educational impact on pupils' mathematics achievement. The most striking gain in scores occurred in grade 1, where the average NCE gain was 24. (NCE stands for Normal Curve Equivalents, a score which expresses performance in relation to the performance of a nationally representative sample of students) . . . Observations of classrooms revealed that teachers were implementing the program according to its guidelines." Def. Supp. Exh. A, p. 33.

14. The evaluator of the Corrective Reading program stated: "In all grades, this program has had a positive impact . . . while the average performance of the group at pretest was far below the state's definition of educationally disadvantaged, (35th NCE) the group average at posttest exceeded that standard." Def. Supp. Exh. B, p. 5.

15. In the Reading Skills Center program, the children were found to have made "major gains" (Def. Supp. Exh. C, p. 4.) during their year in the program. The evaluator concluded, "On the average, students who took both the pretest and posttest gained 11 NCE's. Given that the State Education Department has set the gain of one NCE as the minimum criterion for programs to demonstrate significant educational impact, it can be concluded that pupils in this program have made substantial improvement in reading ability during the course of this year." Def. Supp. Exh. C, p. 30.

16. With regard to English as a Second Language, "all raw score means increased from pretest to posttest" during the 1979-80 school year and the evaluator stated that "The program achieved its stated objectives." Def. Supp. Exh. D, p. 2.

17. The evaluation of the Title I nonpublic school Clinical and Guidance program noted that although the "data on the academic performance of pupils does not separate the influence of the remedial instruction from the gains attributed to the Clinical and Guidance Program . . . the children receiving clinical and guidance

services do show NCE gains. This is commendable since these children, already receiving remedial services, were identified as having problems further affecting their academic performance." Def. Supp. Exh. E, pp. 4-5.

18. New York City's interest in this case transcends its desire to maintain one of the Board of Education's most successful programs. It is of primary importance to New York City that all children, whether they attend public or nonpublic school, reach adulthood with basic language and math skills. These skills are determinative of the ability to effectively participate in the economic and social life of the City. As New York City benefits from an effectively educated population it bears the cost of an educationally deprived one. In the past 15 years, New York City's on premises nonpublic school Title I program has served tens of thousands of economically and educationally deprived children. Yet, the record is bare of any instance of fostering of religious views. Based on defendants' submission to this Court, I urge that defendants' cross-motion for summary judgment be granted.

/s/ Lawrence F. Larkin
LAWRENCE F. LARKIN

Sworn to before me this
12th day of May 1982

/s/ Lorna Bade Goodman
LORNA BADE GOODMAN

Notary Public, State of New York
No. 4627573
Qualified in New York County
Commission Expires March 30, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN, ET AL.,
PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, ET ANO., DEFENDANTS

NOTICE OF CROSS-MOTION

ALLEN G. SCHWARTZ,
Corporation Counsel,
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New York, N. Y. 10007

Due and timely service of a copy of the
within
is hereby admitted.

New York, ...19....

.....
Attorney for

To
....., Esq.,
Attorney for

DEFENDANTS' SUPPLEMENTAL EXHIBIT A

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title 1

Project Identification Number: 5001-64-01624

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAM
CORRECTIVE MATHEMATICS SERVICES
1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools Corrective Mathematics Services Program, hereafter called the Corrective Mathematics Program, served 8,547 nonpublic school students in grades 1 through 11 at 167 sites. Participating students were Title I eligible and required remediation in mathematics (six or more months below grade level). The goals of the program were: (1) to develop pupils' readiness for mathematics learning, (2) to improve pupils' development of mathematical concepts and (3) to increase pupils' achievement in computational and problem solving skills.

Instruction was given in small groups of five to ten students. Each group met two to five times per week for 35 to 60 minutes per session. Emphasis was placed on developmental and discovery techniques. The program provided reference materials, measurement materials, standardized tests, pupil workbooks and audio-visual materials.

The staff included one full-time equivalent (FTE)* coordinator, four FTE field supervisors, 87.4 FTE teachers and three FTE secretaries and/or clerks.

II. *DATA ANALYSIS*

Objectives And Tests Used

Grade 1. Students were to achieve gains in performance in mathematical concepts, as measured by the Stanford Early School Achievement Test, Level II, greater than would have been expected in the absence of treatment.

USOE Evaluation Model A1 was used to derive the "no-treatment expectation." Pretest raw scores were con-

---

* FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis; therefore, the amount of teaching service is expressed in FTE's in lieu of reporting the number of teachers employed.

verted to Normal Curve Equivalents (NCE's), a type of score which expresses performance in relation to the performance of a nationally representative sample of students. Posttest scores were also converted to NCE's. It was assumed that, in the absence of treatment, the mean NCE of the group would be the same at posttest as at pretest.

An increase in mean NCE was interpreted as a gain in performance beyond what would have been expected without treatment.

Grade 2-11. Students were to achieve gains in mathematical computation, concepts, and problem solving, greater than would have been expected in the absence of treatment. These skills were measured by the Total Mathematics Score on the Stanford Achievement Test for Grades 2-8 and by the Total Mathematics score on the Stanford Test of Academic Skills (TASK) for Grades 9-11. USOE Model A1 was used, as above, to derive the "no-treatment expectation." A gain in mean NCE from pretest to posttest was interpreted as a gain in performance attributable to the program.

CHART I
TEST LEVELS AND FORMS, BY GRADE
FOR CORRECTIVE MATHEMATICS PROGRAM

GRADES	TEST LEVELS
Grade 1	SESAT, Level II
Grade 2	SAT, PRIMARY 1, Form A
Grade 3	SAT, PRIMARY 2, Form A
Grade 4	SAT, PRIMARY 3, Form A
Grade 5	SAT, INTERMEDIATE 1, Form A
Grade 6	SAT, INTERMEDIATE 2, Form A
Grade 7-8	SAT, ADVANCED, Form A
Grades 9, 10, 11	TASK, 1 Form A *
Grade 12	TASK, 2 Form A

* Although Level II was specified in the evaluation design, Grade 11 students were actually tested with TASK, Level I. Eleventh grade norms are unavailable for Level I, so that results are not reported for this grade.

Report and Analysis of Evaluation Results

According to the records kept, 8,547 students were served by the program. This evaluation reports on 7,896 students for whom both pre- and post-test data are available. Students were eliminated from analysis because of errors in data transcription, or because appropriate norms were unavailable. For example, all 11th graders in the program were tested with TASK Level I instead of Level II. While this test may have been more appropriate to their instructional level, NCE's have not been produced for 11th graders on this test and the data were not analyzed.

As the following table indicates, the program objectives were met in all eleven grades reported. Performance improvement is particularly striking in grade 1, where there was a mean NCE gain of 24. In grades 2 through 7, where program enrollment is concentrated, mean NCE gains ranged from six to nine.

Correlated t-tests were performed on the raw scores and NCE's for grades 1 through 10 and 12. All gains were statistically significant beyond the .001 level.

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Introduction

A teacher survey provided data from 80 teachers who completed the questionnaire at a group meeting at the end of the school year. The survey was constructed based on responses from the teacher interviews, pretested, and revised by the Office of Education Evaluation (OEE) with assistance from the central Title I Nonpublic School Program administrators.

Interviews conducted with teachers and staff in 12 schools from May 29, 1980 through June 1, 1980 also provided evaluation data. Each site visit included an observation of the Title I instructional program and an interview with the teacher. The sites for the evaluation

CHART II

MATHEMATICS ACHIEVEMENT SCORES FOR STUDENTS IN CORRECTIVE MATHEMATICS PROGRAM, GRADES 1-12

	RAW SCORES		NCEs		MEAN GAIN
	Pre	Post	Pre	Post	IN NCE
Grade 1 Mean	21	43	27	51	24
N=77 Median	21	43	27	46	
SESAT LEVEL II					
Grade 2 Mean	31	45	30	36	6
N=1283 Median	31	45	30	34	
SAT, PRIMARY I					
Grade 3 Mean	44	68	28	35	7
N=1456 Median	44	68	27	34	
SAT, PRIMARY II					
Grade 4 Mean	36	57	30	38	8
N=1477 Median	35	57	29	38	
SAT, PRIMARY III					
Grade 5 Mean	41	60	31	36	5
N=1364 Median	40	60	31	35	
SAT, INTERMEDIATE I					
Grade 6 Mean	43	61	28	37	9
N=944 Median	42	60	30	37	
SAT, INTERMEDIATE 2					
Grade 7 Mean	36	50	28	37	9
N=547 Median	35	47	31	38	
SAT, ADVANCED					
Grade 8 Mean	43	56	30	36	6
N=324 Median	42	53	31	36	
SAT, ADVANCED					
Grade 9 Mean	23	28	33	41	8
N=287 Median	23	29	34	41	
TASK 1					
Grade 10 Mean	24	29	32	38	6
N=160 Median	24	30	32	39	
TASK 1					
Grade 11 Mean	15	19	*	*	*
N=71 Median	15	17	*	*	
TASK 1					
Grade 12 Mean	12	14	18	28	10
N=6 Median	12	14	19	26	
TASK 2					

* All 11th graders were tested with TASK Level I instead of Level II; appropriate norms have not been produced for 11th graders on Level I (See Page 4.)

were selected randomly from a stratified sample of schools in the Title I Corrective Mathematics Program. The interview form was also constructed, pretested, and revised by the Office of Educational Evaluation with assistance from the central Title I Nonpublic School Program administrators. The interviewer was trained in the use of the form by OEE staff and Title I nonpublic school personnel before conducting the interviews. The interviewed teachers were informed that the purpose of the interview was to provide information to the program coordinators and OEE. Teachers were assured that their responses would be reported and stored anonymously. The interviews ranged in length from 40 to 60 minutes; the average interview time was 49 minutes.

Information About Teacher Respondents

Teaching Experience. The survey data indicate that 6% of the 80 teachers had one to five years experience, 45% had six to ten years, 40% had 11 to 15 years, 4% had 16 to 20 years and 5% had more than 20 years teaching experience.

Of the 12 interviewed teachers, 50% had six to ten years teaching experience, 33% had 11 to 15 years experience and 17% had 16 to 20 years experience. No interviewed teacher had less than five years experience.

Teaching Experience in the Title I Corrective Mathematics Program. Of the surveyed teachers who responded to this question, 21% of the teachers indicated that they had one year of experience in the program, 2% had two years experience, 6% had three years, 6% had four years, and 61% had five years or more experience in the Corrective Mathematics Program.

Educational Background. The survey revealed that 9% of the surveyed teachers in the program have a BA/S degree only, 14% have a BA/S degree plus graduate credits and 76% have a MA/S degree.

The interview data show 17% had a BA/S degree plus graduate credits and 83% have a MA/S degree (in ele-

mentary education, guidance administration and supervision, history, or math education). Forty percent of those with graduate degrees have taken 30 graduate credits beyond their Masters degree.

Professional Development Activities. The surveyed teachers were asked about the professional development activities in which they had participated during the past three years. Their responses indicated that 65% had earned college credits, 16% had participated in non-Title I Board of Education workshops, 21% had taken UFT courses, all had participated in Title I * * *

* * * *

[Pages 8 and 9 of original document are illegible and have been omitted in printing.]

* * * cept development; 36%, attention problems; 31% poor self-images (including fear of failure), 29%, behavioral problems; 27%, problems from other achievement areas; and 16%, language problems.

The learning problem most frequently mentioned by the interviewed teachers was reading (75%). Other problems mentioned were poor conceptual abilities (42%); behavioral problems (33%); short attention span (50%); problems in listening to and following instructions (42%); language problems (33%); anxiety (17%); and problems at home (17%). Some teachers also reported specific problems with content materials such as: difficulty with word problems, difficulty in abstract thinking, and lack of basic mathematics facts.

Teaching Methodology

Major Areas of Focus. Major areas of instructional focus indicated by surveyed teachers were: learning of basic arithmetic facts, 79%; acquisition of computational skills, 79%; increasing problem solving ability, 95%; discovering number relationships, 79%; and forming generalizations, 56%.

All interviewed teachers named the learning of basic arithmetic facts and increasing problem solving ability as the major foci of instruction. Ninety-two percent of these teachers viewed acquisition of computational skills, discovery of number relationships, forming generalizations and fixing learning as the major foci of their instruction. Other responses included: conceptual development, 25%; geometry, 8%; thinking logically, 8%; and pratical arithmetics, 8%.

Time Allocation. Interviewed teachers were asked to estimate the time allocated to various instructional activities. Seventy-five percent of the teachers indicated that they spend between 50% and 75% of their time directing instruction to the entire group of an average of ten pupils. These interviewed teachers usually spent 25% of their time on individualized instruction (including monitoring pupils' work), and 10% of their time in formal and informal diagnosis. No interviewed teacher spent more than 10% of the time in discipline and housekeeping duties.

Motivation. The surveyed teachers were asked to identify the methods or techniques they used to motivate students; 91.2% checked games, 83.8% reported using manipulatives, 56.2% checked reward systems (stars, stamps, etc.), 36.2% indicated pupil self-evaluative techniques and 25% reported graphs for self tracking. The survey also asked the teacher respondents to check the most obvious pupil behavioral changes that resulted from the increased motivation. The responses were: 64%, more participation in Title I classroom activities; 39%, willingness to try more difficult materials; 39%, better self-image; 25%, greater rapport with the teacher; 23%, more attentive; and 16%, undertaking independent work.

All of the interviewed teachers indicated the use of games and/or manipulative-type materials as motivational techniques. The interviewed teachers also noted that students have trouble sitting still; it is, therefore, important that the students be involved in activities that allow for

movement. Some movement activities were a classroom store, drawing pictures, and making pancakes as a way of dealing with fractions. Forty-two percent of the interviewed teachers tried to coordinate learning objectives with real-life problems, stores and questions. Seventeen percent used a reward system (stars/stickers) as a motivational tool. Sixty-seven percent indicated that positive changes had occurred in the students' attitudes toward mathematics. Specifically, students were eager to come to class, they requested extra work, they became more confident in their abilities, and their self-image improved. In addition, 42% of the teachers reported a decrease in discipline problems and 25% reported an increase in class participation.

Peer Tutoring, Independent Study and Individualized Instruction. Forty-six percent of the surveyed teachers indicated their students were involved in peer tutoring and 64% indicated that their students were involved in independent study activities.

During the interviews, 67% of the interviewed teachers indicated their students were involved in some form of peer tutoring. This generally took the form of one child who had mastered a topic helping another child with related work. Eighty-three percent reported that their students participated in self-evaluation activities by checking their own work and answers. All but one of the interviewed teachers indicated their students participated in independent study. Twenty-five percent reported their students did independent study in the form of homework assignments, another 25% reported that they would give an independent study assignment to individuals who were performing at a level different from the rest of the class, and 33% said they sometimes gave students work to do independently such as math games, ditto sheets and puzzles. Only one interviewed teacher indicated that children were involved in longer term independent study activities involving several days work on a topic or project.

Pupil Assessment. Surveyed teachers were asked to specify items they used to assess their students' academic abilities at the beginning of a year and during the year. The following table summarizes their responses.

TABLE 1

Techniques used by Teachers (in percentages) to Assess Pupil Achievement at the Beginning and During The Year

Type of Assessment	Beginning of Year	During Year
Title I Program Assessment	19%	9%
An Informal Reading Test	2%	2%
A Standardized Norm Referenced Test	90%	60%
A Standardized Criterion Referenced Test	7%	26%
Teacher-Made Criterion Referenced Test	10%	26%
Conference with Classroom Teacher	20%	27%
An Informal Mathematics Test	20%	0%
Classroom Observation	0%	40%

Surveyed teachers were asked to name their two major uses of the results of the initial assessment: 65% mentioned evaluation of progress; 49%, individualization of instruction; 40%, organization of group work; lesson plans; 6%, teacher self evaluation and 2% indicated using the results of the assessment for diagnostic purposes.

All interviewed teachers indicated that they gave the Stanford Achievement Test for initial diagnosis and assessment of the students' achievement in mathematics. Fifty percent of the interviewed teachers also used teacher made instruments (criterion-referenced tests). In addition, the interviewed teachers said they used the regular classroom teachers' recommendations as part of their initial and on-going assessments.

Interviewed teachers used the initial pupil assessment as a basic tool for long range planning and for organizing the students in groups. The majority of the interviewed

teachers, 83%, also reported using this preliminary testing for individualizing instruction.

Half of the interviewed teachers stated that the Stanford Achievement Test was not an adequate diagnostic instrument because it was a multiple choice test. These teachers felt the students had an advantage because they could guess correct answers to questions on skills they had not yet mastered.

Eighty-three percent of the interviewed teachers indicated that they used the Spring, 1980, administration of the Stanford Achievement Test to reassess students' achievement. In addition, all of the interviewed teachers gave some type of teacher-made test, usually at the completion of a unit. All the interviewed teachers said that their primary method of reassessment was by observation of daily work; and they keep formal records of the skills the student has mastered. All interviewed teachers meet with the regular classroom teacher for additional information for reassessing pupils.

All of the interviewed teachers felt the informal and formal reassessments were important in the evaluation of each student's progress. Sixty-seven percent of the interviewed teachers responded that on-going reassessments helped them to individualized instruction; 67% reported that it aided in organizing group work and 50% used the assessments for short and long range planning. Additional responses were to provide input to parents, feedback to pupils, information for pupil self evaluations, and data to compare with the assessments made by the regular classroom teacher.

Student Records. All interviewed teachers kept records of attendance, test scores, pupils' progress, students' work, a checklist of skill mastery for each student, a record of classroom teacher conferences and notes from their meetings with the nonpublic school principals. Other records included progress reports, records of conferences with other Title I teachers and pupil related correspondence.

Related Duties. All of the interviewed teachers identified the following areas as duties related to teaching: administering standardized tests, diagnosing pupil needs, implementing instruction, participating in in-service conferences, preparing and maintaining lesson plans and pupil records, and confering with parents. Other responses included: preparing instructional materials, organizing classrooms, conferring with teachers and the principal, preparing progress reports, listening to student problems, helping with regular classroom mathematics, and planning the schedules.

Materials. All interviewed teachers found the materials to be appropriate for the pupils they taught. Teachers indicated that commercial materials were helpful and indicated a desire for additional ones.

All of the teachers indicated that the Title I Corrective Mathematics supervisory staff selected the materials they used in their classroom. However, 75% of the teachers said that they had some input into the selection decisions because they could recommend materials.

Support Services

Clinical and Guidance. The survey asked teachers to identify those staff members who referred pupils for clinical and guidance services; 91% checked the Title I Corrective Mathematics teacher; 85%, other Title I nonpublic school teachers; 83%, classroom teachers; 75%, principals; and 27%, parents. Nineteen percent of the survey respondents judged these services to be extremely effective; 26%, very effective; 39%, somewhat effective; 1%, not at all effective; and 9% indicated they did not know.

During interviews, all of the teachers said they referred children to guidance services. Other responses included were: recommendations from the regular classroom teachers (67%), other Title I teachers (42%), the principals (17%), and parents (8%).

The interviewed teachers had varying responses about the effectiveness of the clinical and guidance services. Twenty-five percent of the interviewed teachers felt that guidance services were extremely effective; 8%, very effective; 8%, effective; 42%, somewhat effective; and 8%, not effective at all. The predominant opinion was that effectiveness of the guidance services varied in quality from school, dependent on the specific guidance counselor.

Title I Central Staff. The survey asked teachers to indicate support services provided by the Title I Corrective Mathematics supervisory staff. The surveyed teachers noted supervisory visits, instructional supplies and audio-visual equipment.

All of the interviewed teachers indicated the Title I Corrective Mathematics supervisory staff supplied instructional materials, made supervisory visits, provided reference materials, made available audio-visual equipment, and conducted workshops.

Nonpublic School Principal. Eighty-five percent of the surveyed teachers responding to the questionnaire indicated that the nonpublic school principal provided orientation to school procedures. Sixty-two percent reported the principal arranged scheduling, 18% indicated the principal held monthly conferences and 16% checked that the principal arranged conferences with the regular classroom teachers. Most of the teachers interviewed found the principals to be cooperative and available when necessary. Eighty-three percent of the interviewed teachers reported that the principal encouraged coordination with the regular classroom teacher. Sixty-seven percent indicated that the principal also provided support in the areas of orientation to the school scheduling and pupil related conferences.

Parent Contact.

Number of Frequency. The data indicated that surveyed teachers met an average of 32% of the parents.

Teachers reported seeing some parents on a continuous basis, either weekly or monthly.

Interviews revealed that those teachers met with a range of 7% to 61% * of the parents of all the students they taught (See Table 2). The mean number of parents met per teacher was 30 (the range was from seven to 59). Thirty-three percent of the interviewed teachers had met with less than 25 of the parents (range for parents: 7%-20%); 42 with between 25 and 50 of the parents (25%-44%); 25% with more than half of the parents (51%-61%). No interviewed teacher met with more than 61% of their students' parents.

The number of parents met at each classroom site (see Table 2) ranges from zero to 59. The average number of parents met at any one classroom site was 14. Forty-four percent of the classroom sites in the sample had contact with less than 25 of the parents (0%-23%) range; 40% of the classrooms in the sample had contact with 25% to 50% of the parents, and 16% had contact with more than 50 (52%-75% range). No classroom site had contact with more than 75% of the parents. The interviewed teachers indicated that most of the meetings occurred informally either before or after school. The teachers noted that they had met 10% or fewer of the parents in a formal manner. Contact with parents seemed to be dependent on the proximity of the school to the home address. Contact was high when students walked to school and low when students were bussed in from far away. The interviewed teachers said that since most parents work, they are often unable to meet with their children's teachers.

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* This figure is based on the total number of parents for all sites that each teacher serviced.

TABLE 2

Percentage of Parents Met by Each Interviewed Teacher by Each School Site

SCHOOLS	TWELVE INTERVIEWED TEACHERS											
	1	2	3	4	5	6	7	8	9	10	11	12
School I												
Pupils Taught	40	40	60	96	19	62	26	100	20	82	43	60
Parents Met	13	5	10	59	3	18	5	25	8	50	10	45
Percentage	33%	13%	17%	61%	16%	29%	19%	25%	40%	61%	23%	75%
School II												
Pupils Taught	40	40		59	40	56			21		43	36
Parents Met	8	10		2	12	20			11		4	10
Percentage	20%	25%		3%	30%	36%			52%		9%	28%
School III												
Pupils Taught	19				20				40		19	
Parents Met	3				2				20		0	
Percentage	16%				10%				50%		0%	
School IV												
Pupils Taught									20			
Parents Met									5			
Percentage									25%			
Totals												
Pupils	40	99	100	96	98	102	82	100	101	82	105	96
Parents Met	13	16	20	59	7	30	25	25	44	50	14	55
Percentage	33%	16%	20%	61%	7%	29%	30%	25%	44%	61%	13%	57%

Only 16% of the interviewed teachers reported daily meetings with any parents; when this contact did occur it was informal (on the street, before or after school). An additional 33% of the teachers saw some parents informally on a weekly basis. Eighty-three percent of the interviewed teachers indicated contact with some parents every reporting period, 58% on a monthly basis, and 100% reported seeing some parents on a yearly basis (both formally and informally). (See Table 3.)

TABLE 3

Frequency of Parent Contact by Each Interviewed Teacher

	TWELVE INTERVIEWED TEACHERS											
	1	2	3	4	5	6	7	8	9	10	11	12
Number of Parents Met	13	16	20	59	7	30	25	25	44	44	14	55
# seen daily	0	0	*	0	0	0	0	0	0	30	0	0
% seen weekly	50	0	*	50	0	3	0	0	0	30	0	50
% seen monthly	50	0	100	75	0	3	0	0	0	30	20	50
% seen every reported period	30	100	20	100	100	5	0	100	100	95	50	0
% seen yearly	100	100	100	100	100	100	100	100	100	100	100	100

* Missing data.

Method. According to the survey, the most commonly reported means of communicating with parents was face-to-face (80%). Other means reported were by telephone (22%), by written communication (20%), and by parent/tutorial workshops (35%).

Interviewed teachers were also asked about the ways they communicated with parents. All of the teachers reported face-to-face meetings. Other methods included by telephone (83%), written communications (including written progress reports), and form letters.

Initiation. Seventy-nine percent of the survey respondents indicated that the Title I corrective mathematics teacher initiated the majority of teacher-parent contacts; 15% named the parents and 1% indicated the regular classroom teacher.

Ninety-two percent of the interviewed teachers identified the Title I teacher as initiating the parent-teacher contact. Eighty-three precent [sic] of the interviewed teachers stated that some of the parents also made the initial contact. Other reported responses included the classroom teacher (50%), pupils (33%), guidance counselors (17%), and principals (8%).

Classroom and Home Involvement. Ninety-two percent of the interviewed teachers reported having individual conferences with parents to discuss the students' progress. Over half of the interviewed teachers (58%) indicated that parents came to the classroom to observe. Again, the interviewed teachers reported that inadequate transportation for parents to the school hindered parental involvement activities. It was also reported that some parents had full time job obligations or were unable to help their child (e.g., because of language difficulties).

Teachers also reported ongoing articulation and communication with parents, both through homework assignments and through parental involvement in game playing and math activities.

Major Concern of Parents. According to the survey, teachers feel the major concern of parents was whether their children were performing on grade level.

All of the interviewed teachers indicated that the primary concern of the parents was their children's progress. Other major parental concerns, as assessed by interviewed teachers, including having their children reach grade level performance (58%) and whether or not the child would be promoted (50%). Other reported parental concerns included: behavior in the classroom (17%): other services available to the child (8%); how they as parents can help their child's achievement (8%); and removing the child from the regular classroom to attend Title I classes (8%).

Recommendations

Survey Results. The survey listed seven recommendations and asked teachers to check the one they considered most important. The results were:

36%—More teacher involvement in materials selection

33%—Fewer students seen more often

18%—More workshops based on Title I teacher input (re: teaching techniques)

5%—More opportunity for coordination with the classroom teachers

2%—No significant improvement is required

1%—More opportunity for coordination with the guidance counselor

1%—More opportunity for coordination with other Title I personnel

General. General recommendations suggested by the interviewed teachers included: increase the frequency of instruction from twice a week to three to five times per

week (33%); decrease group size to permit more individualized attention (25%); more teacher involvement in materials selection (25%); more teacher exchange workshops (17%); change in the student eligibility rules so that those who are poor in math, but good readers can be included in the Corrective Mathematics Program, (8%); and increase guidance services (8%).

Staff Development. The most common recommendation was to have more workshops. Some suggestions for these workshops included a course on learning disabilities, making your own materials and model lessons. Other recommendations included more teacher-to teacher exchanges, and more teacher intervisitions.

Para-professional. Several interviewed teachers indicated that they would like to have a para-professional to help with individual pupils. All of the interviewed teachers with para-professional aides were very pleased with them.

It should be noted that para-professionals are employees of decentralized programs and as such are hired, supervised, and evaluated by community school district staff.

Para-professional staff when assigned by community school districts will, under the guidance of the Title I teacher: (1) work with the selected pupils on a one-to-one or small group basis on specifically planned activities geared to foster skills as diagnosed and taught by the Title I teacher; (2) assist with preparation of materials; and (3) assist with clerical and housekeeping tasks.

Pupil Selection. Seventy-five percent of the interviewed teachers recommended that students be placed in the program on the basis of their math disability only. Presently, the students must initially show disability in reading before becoming eligible for the Corrective Mathematics Program.

Coordination with the Regular Classroom Teacher. The Title I teacher confers periodically with the non-

public school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff. Several interviewed teachers recommended more communication with the classroom teacher. Constitutional limitation and judicial decisions determine the extent to which Title I staff are involved in the nonpublic school instructional program.

Coordination with other Nonpublic School Title I Program Staff. Several interviewed teachers indicated that communication is a problem because the days the dfferent teachers are at the same site do not always overlap.

III. [sic] *CLASSROOM OBSERVATION SUMMARY*

Introduction

At each of the 12 sites visited, classroom observations were made the same day as the teacher interview. The classroom observation usually took two and one-half hours. Fifty percent of the observations were made in the morning and 50% in the afternoon.

Classroom Characteristics

Ten of the 12 classrooms were adequate in the categories of lighting, physical orderliness, space, ventilation, flexibility and freedom from external noise. Many of the classrooms were large and sunny and permitted an extensive display of teaching materials and student work. Of the classrooms found inadequate, one was on a poorly lit stage with poor ventilation. The space was shared with the reading teacher and thus provided little roon [sic] for math displays and/or math assignments. The other class met in the library, and that library was quite crowded. There seemed to be little blackboard space, and the math materials, although sufficient, were not readily accessible.

General Observations

A typical lesson was divided into three activities: (1) a game providing drill on a previously learned skill or the topic of the day; (2) a development lesson during which the teacher introduced a topic, many of these lessons included the use of manipulatives; and (3) a follow-up activity involving a pencil and paper task at which time the teacher provided for individual needs by circulating from child to child.

Teachers gave students immediate oral feedback through the lessons observed. Some teachers guided the children in discovering the algorithm while others tended to tell the children the process they should use. Developmental lessons in all classes included dialogue between the teacher and the students; there were no lecture classes.

Seventy-five percent of the teachers used manipulative materials during the observation period. Eighty-three percent of the teachers used games to reinforce and teach skills. All of the surveyed teachers used games and/or manipulatives. This observation is in keeping with the teacher interviews as well as the survey responses indicating that 91% of the teachers reporting using games and 84% reported using manipulatives. Twenty-five percent of the surveyed teachers used a discovery-type approach in their lessons and utilized a written or oral drill to reinforce skills. In addition, visual aids were observed in 17% of the classrooms.

Classroom Observation Checklist: Teacher

Other observations listed in Table 4, include the following: 92% of the teachers encourage children who work independently; one teacher insisted on group participation (8%). Ninety-two percent encouraged the children to work together; one teacher had prepared individual assignments for each child and did not encourage conversation among the pupils (8%). There were no social problems evident in any of the classrooms. Therefore, there was no opportunity to observe teachers solving social problems. All of the teachers worked with

the children, talked to them about their activities, helped children solve academic problems and encouraged children in their work. Twenty-five percent of the teachers were involved in pupil diagnosis/prescription during the observation period.

TABLE 4

Classroom Observation Checklist: Teacher

ACTIVITIES	# OBSERVED
Encourages children to work independently	92%
Encourages children to work together	92%
Talks with children about their activities for the instruction period	100%
Works along with children	100%
Helps children solve academic problems	100%
Helps children solve social problems	42%
Encourages/reinforces children in their work	100%
Gives feedback to children on their progress	83%
Pupil diagnosis/prescription	25%
General discussions with pupil(s)	0%
Individual pupil conference	0%

Classroom Observation Checklist: Children

Observations of the children were also made and summarized in Table 5. Children's work was visibly displayed in all classrooms. There were no classes in which groups of children worked independently or decided what activity they would engage in. Children spent time working independently in 83% of the classrooms.

TABLE 5

Classroom Observation Checklist: Children

ACTIVITIES	# CLASSROOMS OBSERVED
Work independently	83%
Work in small group independent of teacher	0%
Children decide what they will do (their plan is not limited to specific teacher conceived activities)	0%
Children's work is visibly displayed in classroom	100%

IV. [sic] *SUMMARY OF INTERVIEWS WITH PROGRAMS COORDINATOR AND FIELD SUPERVISOR*

Introduction

This section provides a summary of two separate interviews, one with the program coordinator and the other with the field supervisor. Both people have been involved with the program for 14 years. The proogram coordinator has been in that position for the entire 14 years and the field supervisor was a teacher in the program for five and one-half years and has served as the field supervisor for the past eight and one-half years.

Program Considerations

Goals. The primary goal of the program is to improve the mathematical ability of those children with diagnosed weaknesses in the areas of computation, mathematical concepts, and problem solving. The coordinator suggested that a hidden goal is to improve the children's attitude toward mathematics by creating an interest, eliminating fears and developing an appreciation of the idea that math is all around us.

In 1966, when the program began, the stated goal was to bring the children up to grade level. As the program evolved, it was discovered that the children had to be motivated and thus the hidden goal was conceived—to develop an interest and appreciation of mathematics. These goals were established by the program coordinator.

Strengths and Needs. The strengths of the program are centered in the small group size and the opportunity for individual attention; the supervisor added that the dedication and training of the staff was an asset; and the coordinator also emphasized the teachers' training in elementary mathematics. The coordinator pointed to the need for adequate time and space for staff development. The coordinator also suggested a special certification category for teachers of corrective mathematics. No

changes are presently anticipated; the program will continue as currently formulated.

Purpose of Program Assessment. The coordinator said that program assessments served for future planning and adjustment in the program as well as changes in teaching methodology. The supervisor added that the pupil assessments helped to gear the program toward the actual need of the individual child.

Instructional Considerations

Approaches to Instruction. The use of games and concrete manipulatives were emphasized. The coordinator focused on the use of technological developments such as computers and calculators. The supervisor mentioned an eclectic approach (audio-visual, manipulative, and the like) and a problem-solving approach using the various computational techniques.

Daily lesson. The supervisor outlined a standard lesson plan format consisting of a review of prerequisite skills, followed by a drill on the new or previous topics, a motivational activity presented as a question or a problem, and the lesson development. The final goal is to have the students apply their understanding of a particular concept or skill to the mastery of a new concept or skill.

Motivation. The coordinator and supervisor stressed that the use of colorful materials, a hands-on approach to learning arithmetic concepts, and the application of mathematics to everyday situations encountered by the child were the primary motivational techniques. No one textbook is prescribed, however, several textbook series are provided for teacher reference.

Overlap Between What is Taught and What is Tested. The corrective mathematics instructional objectives are more comprehensive than those measured by a standardized test. The coordinator stated that the instruction is based on weaknesses revealed by the pretest. The supervisor stated that teachers use the *New York City's*

Scope and Sequence, and *Minimal Teaching Essentials* and other New York City Board of Education publications.

Introduction of New Ideas/Approaches/Topics. The coordinator noted that during the last three years there has been an increase [sic] use of calculators as well as an increased emphasis on geometry at the elementary school level. The supervisor pointed out the new emphasis on the metric system. She also noted an emphasis toward a sensory (auditory, visual tactile) approach to instruction. The coordination of reading and math skills was also mentioned by the supervisor.

New ideas/topics/approaches are developed by the coordinator and the supervisor. The supervisor emphasized that they kept abreast of the newest methods and endeavored to adapt these to the Corrective Mathematics Program's teachers' and pupils' needs. New ideas/topics/approaches are taught to teachers during in-service workshops.

Student Considerations

Reporting of Students' Progress. The teachers discuss progress with the students daily. The supervisor reported that each student has a folder containing all of his work. The teacher also discusses the bi-yearly progress report with the student.

The parent receives two written progress reports on the child during the year. The supervisor added that parents are able to discuss their child's progress during formal and informal contacts with teachers at parent workshops.

The school principal is given a copy of each child's September and May Stanford Achievement Test scores. The supervisor also indicated that teachers maintain an on-going dialogue with the principal.

Retention of Students. Retention in the program was determined by two criteria; remaining on the eligibility list and failure to reach grade level performance.

Personnel Considerations

Supervisory Staff's Responsibilities. Informal field visits are made by the field supervisor to each teacher based on individual needs. A formal observation is made and forms the basis for a written report. Recommendations concerning teacher performance are discussed during post-observation conferences and through follow-up visits.

The supervisor mentioned that all supervisors and coordinators meet throughout the year and exchange input on the various Title I nonpublic school programs. The coordinator said that a supervisor might occasionally stop in to see teachers in other Title I programs in order to maintain inter-program communications.

Program Changes and Development. New methodologies and materials are first discussed at the supervisory level and then presented to teachers at workshops. Small groups of teachers are then asked to try the new methodology or materials for possible program-wide implementation.

Strengths and Needs of Instructional Staff. The coordinator and supervisor stressed the dedication of the teachers to the program, their qualifications, knowledge of the subject matter and their empathy for the children as the major strengths of the teaching staff.

In order to strengthen the instructional staff, the supervisor suggested the possibility of requiring an MA degree in remedial mathematics education for all future teachers. The coordinator stressed the need for a designated central program location and more time for staff training.

Recommendations

General. Both the coordinator and the supervisor stressed that pupils should be selected based on the mathematics disability alone and should allow inclusion

of children with good reading skills who are deficient in mathematics skills.

Staff Development. The coordinator suggested requiring special certification for Corrective Mathematics teachers. The coordinator also recommended making videotapes of master teachers available as a resource for the staff.

Materials. Both the supervisor and the coordinator stressed the importance of keeping abreast of new materials and adapting "useful" materials for the program.

Coordination with the Central Title I Program Staff. Both the coordinator and the supervisor felt that all Title I central staff work very closely together. No recommendations were made.

VI *EVALUATION CONCLUSIONS AND RECOMMENDATIONS*

Conclusions

Analysis of the pre- and posttest data for corrective mathematics students indicates that the program had significant educational impact on pupils' mathematics achievement. The most striking gain in scores occured [sic] in grade 1, where the average NCE gain was 24. This finding is worthy of further investigation. A major issue to address is: Are there specific instructional variables accounting for this gain? If specific instructional variables can be identified, the likelihood that they will be implemented in the following years will be increased.

Observations of classrooms revealed that teachers were implementing the program according to its guidelines. Furthermore, children were engaged in their lessons; all teachers provided encouragement and reinforcement to children at work.

Recommendations

Corrective mathematics teachers offered the following recommendations for program improvement: 1) fewer

students seen more often, 2) greater involvement in materials selections, 3) more workshops including a course on learning disabilities, making materials, and model lessons. In addition, 50% of the interviewed teachers felt that the Stanford Achievement Test was not an adequate diagnostic instrument, because the test items are multiple choice and hence, gave the student an opportunity to guess the correct answer. The evaluation team cannot fully assess the feasibility or desirability of implementing all of these recommendations. However, we do suggest that the program coordinator discuss these issues with teachers at staff meetings or during field visits.

One problem mentioned by both teachers and supervisors was the state mandated criteria for pupil selection. Pupils are selected for participation only if they are below grade level in reading as well as mathematics. Furthermore, 75% of the interviewed teachers mentioned that poor reading ability was one of the most common learning problems of their students. The evaluation team supports the program staff's concern with this issue.

An administrative practice worthy of praise is the manner in which instructional materials are selected for use. The materials are piloted on a sample of teachers to obtain their feedback before the material is considered for distribution system wide. We suggest that this practice be adopted in the other program components. In addition, the program coordinator recommended that video tapes be made of master teachers as a resource for the staff. Implementation of this suggestion would help to satisfy the teachers' desires for workshops focused on model lessons. Furthermore, it may cut down on the time needed for teacher intervisitations.

Finally the evaluation staff recommends that the effect of the tutor computer and the parent tutorial program be examined to determine the impact on pupil mathematics achievement.

DEFENDANTS' SUPPLEMENTAL EXHIBIT B

OEE
EVALUATION
REPORT

FINAL EVALUATION REPORT

ESEA Title I

Project Identification Number: 5001-64-01622

ESEA TITLE I
NONPUBLIC SCHOOL PROGRAMS
CORRECTIVE READING SERVICES

1979-1980

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I. *PROGRAM DESCRIPTION*

The Title I Nonpublic Schools Corrective Reading Services Program, hereafter called the Corrective Reading Program, served 11,789 nonpublic schools students in grades 1 through 12. The program, located at 212 sites served Title I eligible students (that is, pupils with below minimal competency in reading achievement). The goal of the program was to improve pupil's achievement in the areas of word attack, word knowledge, reading comprehension, writing and editing skills through remedial reading and writing instruction.

Instruction was given in small groups of ten pupils or less. Frequency of instructional sessions was determined by the pupils' achievement levels, severity of reading retardation, and school schedules. Pupils attended from two to five periods a week for 45 to 60 minutes per session.

The varied materials provided by the program included multi-media devices and conventional remedial reading materials (trade books, library books, work books). The staff included one full-time equivalent (FTE)* coordinator, two field supervisors, 121.2 FTE teachers and four secretaries and/or clerks.

This evaluation report is meant to report student achievement data; to describe program implementation from the teachers' and coordinator's perspectives; and to indicate directions for a more indepth evaluation during the 1980-81 year. [sic]

II. *DATA ANALYSIS*

Objectives And Tests Used

Readiness Level Grade 1. Students were to achieve gains in performance on three subtests of the Stanford

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* FTE: Full-time equivalent; one FTE is equivalent to one full-time staff position. Some teachers in the program are hired on a part-time or per diem basis; therefore, the amount of teaching service is expressed in FTE's in lieu of reporting the number of teachers employed.

Early School Achievement test greater than would have been expected in the absence of treatment. The three subtests were environment, letters and sounds, and aural comprehension.

USOE Evaluation Model A1 was used to derive the "no-treatment expectation". Pretest raw scores were converted to Normal Curve Equivalents (NCE's—a type of score which expresses performance in relation to the performance of a nationally representative group of students). Posttest scores were also converted to NCE's. It would be assumed that, in the absence of treatment, the mean NCE of the group would be the same at posttest as at pretest.

An increase in mean NCE was interpreted as a gain in performance beyond what would have been expected without treatment.

Grades 2-12. Students were to achieve gains in performance in reading comprehension greater than what would have been expected in the absence of treatment. Reading comprehension was measured by performance on the comprehension subtest of the Stanford Diagnostic Reading Test, 1976 edition, for Grades 2-8; and by performance on the comprehensive subtest of the Stanford Test of Academic Skills, for grades 9-12. USOE Model A1 was used, as above, to derive the "no-treatment expectation". A gain in mean NCE from pretest to posttest was interpreted as a gain in performance attributable to the program.

CHART I

TEST LEVELS AND FORMS, BY GRADE FOR THE CORRECTIVE READING PROGRAM

GRADES	LEVELS
Grade 2	SDRT, Red level, Form A
Grade 3, 4	SDRT, Green level, Form A
Grade 5-8	SDRT, Brown level, Form A
Grade 9, 10	TASK, Level I Form A
Grade 11, 12	TASK, Level II Form A

Report and Analysis of Evaluation Results

According to the records kept, 11,789 pupils were served by the program. Data were submitted for 11,782 students. This exaluation reports on 10,253 pupils in Grades 2-12, and 205 students in grade 1 for whom valid pre- and posttests scores were available.

CHART II

TEST SCORES FOR STUDENTS IN
THE CORRECTIVE READING PROGRAM, GRADE 1

SUBTESTS	Raw Score (mean) Pre	Post	NCE (mean) Pre	Post	Change in mean NCE
Aural Comprehension N=203	12	16	24	34	10
Letters and Sounds N=205	21	33	33	41	8
Environment N=202	17	21	23	34	11

CHART III

READING COMPREHENSION SCORES FOR STUDENTS IN CORRECTIVE READING, GRADES 2-9

Grades		Rae Scores Pre	Rae Scores Post	NCEs Pre	NCEs Post	Change in NCE
Grade 2	Mean	20	36	30	37	7
N = 1617	Median	18	37	31	38	
SDRT Red						
Grade 3	Mean	24	38	27	39	12
N = 1792	Median	24	39	28	39	
SDRT Green						
Grade 4	Mean	35	45	(31)	(38)	7
N = 1870	Median	37	47	32	37	
SDRT Green						
Grade 5	Mean	17	25	(27)	(37)	10
N = 1651	Median	16	24	30	38	
Grade 6	Mean	21	31	28	38	10
N = 1266	Median	20	31	30	38	
SDRT Brown						
Grade 7	Mean	26	37	30	38	12
N = 792	Median	26	38	32	38	
SDRT Brown						
Grade 8	Mean	31.8	42	30	41	11
N = 543	Median	33	45	31	43	
SDRT Brown						
Grade 9	Mean	22	30	16	24	8
N = 403	Median	22	30	17	25	
TASK Level I						

CHART IV

READING COMPREHENSION SCORES FOR STUDENTS IN CORRECTIVE READING, GRADES 10-12

Grades		Raw Scores Pre	Raw Scores Post	NCEs Pre	NCEs Post	Mean Gain in NCE
Grade 10	Mean	25	33	18	24	6
N = 205	Median	26	32	20	25	
TASK Level I						
Grade 11	Mean	20	28	10	23	13
N = 93	Median	19	27	7	23	
TASK Level II						
Grade 12	Mean	19.57	24	9	15	6
N = 21	Median	16	22	3	14	
TASK Level II						

In all grades, this program has had a positive impact. In grades 2-7, where the program is most extensive, the pretest mean NCE's ranged from 27 (percentile equivalent=14) to 31 (percentile equivalent=18), while the posttest NCE means range from 37 (percentile equivalent=27) to 39 (percentile equivalent=30). Thus, while the average performance of the group at pretest was far below the state's definition of educationally disadvantaged, (35th NCE), the group average at posttest exceeded that standard.

Correlated t-tests were performed on all raw scores and NCE's for each grade level. All gains were statistically significant beyond the .001 level. In general, this program serves a highly disadvantaged population, and appears to have had substantial impact on the group.

III. *SUMMARY OF SURVEY DATA AND TEACHER INTERVIEWS*

Data for the survey responses were collected from 98 reading teachers who completed the survey at a group meeting at the end of the school year. The survey was constructed, based on the responses from the teacher inviews, pretested, and revised by the Office of Educational Evaluation with the assistance from the Title I Nonpublic School Program administrators.

Data for the interview sections of this report were collected in twelve schools over a period of two and half [sic] weeks from May 22 to June 6, 1980. Each site visit included an observation of the Title I Corrective Reading class and an interview with the teacher. The sites for this evaluation were selected randomly from a stratified sample of schools in the Title I Nonpublic Schools Corrective Reading Program. The interview form also was constructed, pretested and revised by the Office of Educational Evaluation with assistance from the Title I central administrators. The interviewer was trained in the use of the interview form before the interviews began.

The teachers interviewed were informed of the purpose of the interview: to feed back information to the program coordinator for administrative and evaluative purposes. The teachers interviewed were assured complete confidentiality and anonymous reporting of their responses. Each interview took between 70 and 90 minutes. The mean interview time was 78 minutes. Some of the observations took place before the interviews and some of them were after the interview depending on the schedule of the teachers. In several instances the interview was started before the observation and completed after the classroom observation.

Information About Teacher Respondents

Teaching Experience. According to the survey results, 11% of the teachers had taught one to five years, 32% had taught six to ten years, 40% had taught 11 to 15 years, 2% had 16 to 20 years experience and 6% had more than 20 years teaching experience.

Interviewed teachers all had a minimum of five years teaching experience; 50% had six to ten years experience and 50% had taught for 11 to 15 years.

Teaching Experience in the Title I Nonpublic Schools Program. Teacher responses to the survey indicated that 15% had taught in the program for one year, 2% had taught for 2 years, 2% for three years, 7% for four years and 73% for more than 5 years.

Of the interviewed teachers, 33% had participated in the nonpublic schools program for one to five years, 58% for six to ten years, and 8% for 11 to 15 years.

Educational Background. Survey data reveal that 91% of the teachers have a MA/S degree and 9% of the teachers have a BA/S degree and graduate credits. All of the interviewed teachers have a MA/S degree in education.

Professional Development Activities. The survey asked teachers to check all the professional development activi-

ties in which they had participated during the last three years. The results were: 100%, Title I workshops; 67%, college credits; 42%, publishers' materials workshops; 40%, local and national professional conferences; 23%, other non-credit courses; 15%, UFT courses; and 13%, non-Title I Board of Education workshops.

During the past three years all of the teachers interviewed had been involved in some type of professional development: 42% of the teachers had participated in workshops, seminars, or had been actively involved in in professional organizations.

Pupil Profile

Number of Students Taught. The survey indicated that the teachers taught an average of 92 students per week. The number of pupils taught by each interviewed teacher ranged from 51 to 100; the average was 86. Thirty-three percent of the interviewed teachers met students at only one site, 50% at two sites, 8% at three sites and 8% at four sites.

Criteria for Selection. Interviewed teachers were asked to identify the criteria used for selecting pupils for the Corrective Reading Program. Ninety-two percent of the teachers indicated the criteria provided by the eligibility list were used for selection. Other responses included: severely disabled readers (83%), classroom teacher recommendations (50%) and principal recommendations (33%).

Participants in Selection. Survey respondents indicated that the following people participated in the selection process: Title I teachers (92%), the guidance counselor (44%) and other Title I teachers (29%).

All 12 interviewed teachers said the non-public school Title I guidelines were used in the selection of students. The teachers reported participants in these decisions included the Title I teacher (reported by 75% of the respondents), the classroom teacher (83%) and the school principal (75%).

Most Common Learning Problems. The survey listed eight learning problems and asked teachers to identify the three that most frequently interfered with student achievement. The responses were: 56%, limited oral vocabulary; 53%, general problems in concept formation; 46%, retention skills; 45%, attention problems; 45%, poor listening skills; 34%, poor self-image; 15%, behavioral problems; and 12%, problems in other achievement areas.

The 12 interviewed teachers mentioned an extremely wide variety of learning problems that interfered with achievement. Most frequently stated were poor inferential, conceptual, and/or critical thinking ability (75%); lack of vocabulary (50%); poor work attack skills (50%); lack of understanding main ideas (33%); and low self-esteem (25%). Additional problems mentioned related to specific reading or writing needs of the students, and poor study skills.

Teaching Methodology

Major Areas of Focus. Surveyed teachers were asked to check the major areas of focus of their instruction. The responses were: 91%, foster accurate total comprehension: 87%, development of flexible means of word analysis; 78%, development of writing techniques; 69%, development of language arts, skills and concepts; and 56%, study skills.

All 12 interviewed teachers responded that total accurate comprehension was a major focus of their instruction. All teachers interviewed also identified as major areas of focus: development and/or enrichment of language concepts: development of flexible means of work analysis; and development of writing techniques. Other areas of focus identified by relatively fewer teachers were better functioning in the classroom (33%), improvement of study skills (17%), enjoyment of reading (17%), higher self esteem (8%) and improvement of critical thinking skills (8%).

Time Allocation. The amount of time spent in different instructional groupings varied widely between teachers. All of the interviewed teachers spent at least some time on whole group instruction and some time on individual instruction. Forty-two percent of the teachers regularly spend time on small group activities. Even though the interview instrument did not specifically ask about it, three teachers mentioned that they have time for "sustained silent reading" in each class. Seventy-five percent of the interviewed teachers stated that they do on-going diagnosis throughout each class; therefore teachers had difficulty specifying a specific time allotment for diagnosis.

Motivation. Teachers responding to the survey were asked to identify the methods and techniques they used to motivate students: 75.5% used games, 68.8% used other pupil self-evaluative techniques, 53.1% used reward systems (stars, stamps, etc.), 28.5% used graphs for self-tracking and 28.6% used manipulatives. The survey asked teachers to identify the two most obvious behavioral changes that resulted from increased motivation. Their responses were: more pupil participation (54%); pupil willingness to try more difficult materials (45%); pupils know what to do without asking (30%); pupils are more attentive (20%); and pupils display greater rapport with teacher (21%).

Teacher interviews revealed that techniques and materials for motivating students varied widely, from "enthusiasm" to "treats". One teacher interviewed said her technique is "presenting it in a good way": another said, "I'm honest and direct. I tell the students if they do not work hard they are cheating themselves." A third teacher explained, "I present reading as a skill to make them brighter, as a desirable skill to have." Specific motivational techniques included asking questions (17%), reading stories aloud (17%), using the interests, experiences and writings of the children (50%), using things that happen in school (17%) or to the

teacher (8%), and integrating fun and novelty with lessons (25%). Specific motivational materials included pictures (17%), literature (17%) poetry (17%), newspapers (25%), television (8%), concrete objects (17%), colors (8%), games (17%), and teacher made tapes (8%). One teacher said her children wrote for free materials; another said she used a "problem box" to motivate students, encouraging "Dear Abby" interchanges. Twenty-five percent of the teachers said, "I'll use anything that catches their interests—everything", and one said, "I become an actress."

Teachers described changes they have noticed indicating increased motivation. These ranged from very general to very specific changes related to student behaviors, attitudes, and achievement. Changes related to student conduct included borrowing more books (33%), reading during Sustained Silent Reading time (17%), asking for more difficult work (8%), talking more about the books they are reading (8%), finishing work (8%), participating more in class (8%), and knowing routines (17%). Changes related to students' attitudes were: more enthusiastic—asking for more projects (8%); enjoying reading aloud (8%); anticipating coming to reading class (33%); liking to read what they write (8%); expressing feelings of competence (8%); acting more mature (8%); feeling self-confident (8%) and acting more attentive (17%). One teacher said the children are more eager to ask, "What are we going to do now?" more frequently. Changes related to student achievement were: writing more (8%); writing better (8%); reading simple vocabulary (8%); and general improvement in class work (17%).

Peer Tutoring, Independent Study and Individualized Instruction.

Survey responses to the question "Are your students involved in peer tutoring?" were: 38%, yes; 60%, no. Survey responses to the question, "Are your students

involved in independent study activities?" were: 79%, yes; 18%, no.

Eight of the 12 interviewed teachers stated that their students are involved in peer tutoring. One said that students read with one another; another teacher qualified her responses by adding, "I do it informally, not officially. Sometimes one child will help another."

Ninety-two percent of the interviewed teachers stated that their students are involved in self-evaluations.

Eighty-three percent of the teachers indicated that their students are involved in individual activities. Fifty percent explained that they give children individual assignments to do independently. One said, "After a whole group lesson, I usually give them individualized assignments to work on by themselves." One teacher described a contract system she had with fifth, sixth, and seventh graders in areas where she felt they needed reinforcement but not her direction.

Writing Skills, Survey Results. Ninety-one percent of the teachers reported using writing samples in connection with teaching writing. Seven teachers do not use writing samples. Those teachers reported that using writing samples was extremely effective (12%), very effective (44%), somewhat effective (35%), and not at all effective (2%). Teachers were asked if they could detect growth in any of three particular areas by reviewing their pupils' writing samples. Ninety-two percent indicated growth in sentence sense, 79% indicated growth in pupils' ability to express themselves, and 65% saw growth in the pupil's ability to write in longer units.

Writing Skills, Interview Results. Seventy-five percent of the teachers indicated improvement in a variety of areas—attitudes, criticial thinking skills, and general communication skills. Improvement was noted in the following areas: better appreciation for poetry and stories (17%), more awareness of spelling and punctuation (17%), and eagerness to read what they write (25%).

Seventeen percent of the teachers interviewed said teaching writing has helped students' critical comprehension and critical thinking skills. Twenty-five percent of the teachers said that the students are making connections between reading and writing and are seeing that writing skills (topic sentences, main ideas, details) are parallel to reading skills. One teacher indicated that teaching writing has helped her students become more verbal. Only two of the teachers stated that the teaching of writing has not affected the reading achievement of their pupils.

Time Allotment. Preferences for teaching writing varied from one hour once a week to ten minutes every other week. The great variation in teacher preference, in part, reflects their different teaching schedules. Some teach classes two days a week for an hour each, while others have classes once a week for an hour. Fifty-eight percent of the teachers indicated preference for ten to 15 minutes of writing activity daily. Twenty-five teachers preferred more time; 17% preferred less time.

The 12 interviewed teachers used writing books, activities, objects, literature, and commercial products to teach writing skills. Twenty-five percent of the teachers used *Spotlight on Writing*, 25% use *Writing Power*, 8% used worksheets, and another 8% said they get ideas from "idea books." The teachers described many activities including transforming and expanding sentences, making lists of adjectives, verbs and other parts of speech, listing synonyms and homonyms and writing beginnings and endings of stories.

One teacher focused on the practical, asserting that her students like filling out application forms and driver license forms. Another teacher taught outlining and two teachers used research to teach writing. Other ideas for ways to teach writing include: focus on creative writing by offering children ideas to write about; and involve children in sensory activities and ask children to write a description of another person for the other students to identify.

Some of the objects used to teach writing include pictures, posters, television, and newspapers. The teachers also incorporated poetry, literature, storytelling and singing. Several teachers had the children create stories and rexographed the stories for other students to read.

All the interviewed teachers said they diagnose writing skill needs based on the children's own writing.

Ninety percent of those interviewed indicated that their students had improved in sentence sense and in the ability to express themselves effectively. Forty-two percent reported that their students could write in longer units, and 33% noted that their students now write in shorter units, with fewer run-on sentences.

Public Assessment Instruments

Table 1 summarizes the surveyed teacher's responses on methods of pupil assessment.

TABLE 1

Percent of Teachers Using Various Assessments
At the Beginning of the Year and During the Year

Method	Used Beginning	Used during Year
1. Title I Program Assessment	55%	33%
2. An Informal Reading Test	60%	55%
3. A Standardized Norm Referenced Test	87%	54%
4. A Standardized Criterion-Referenced Test	21%	12%
5. Teacher Made Criterion-Referenced Test	32%	43%
6. Conference with Classroom Teacher	52%	71%
7. Informal Reading Test	3%	—
8. Classroom Observation	—	58%

Ninety-two percent of the interviewed teachers used the Stanford Diagnostic Test for assessment at the beginning of the year. Two teachers commented that they liked the test because it helps them "pinpoint problems

well." Additional measures used by teachers for initial diagnosis were Roswell-Chall (25%), Dolch Basic Word List (17%), SRA scores (17%) and Durrell or Gray Oral (8%). Informal diagnostic assessments included having the children read aloud (50%), reviewing the textbooks used by the children (8%), giving informal teacher-made tests (17%) and asking the child about the difficulties he was having (17%).

According to the survey, assessments were used in the following ways: individualizing instruction (90%), diagnosing pupil needs (64%), lesson planning (19%), organizing group work (16%) and evaluating pupil progress (8%).

The initial pupil assessment was used by all 12 interviewed teachers to individualize instruction and to plan long range lessons. There were exceptions to each case, however. One teacher said she individualized only phonics. One teacher said she did not have individual lessons because "most of the children need everything." Other purposes of the initial pupil assessment identified by teachers were: to organize group work (75%), to evaluate progress (50%) and to fulfill Title I guidelines (67%).

All interviewed teachers used formal and informal techniques to evaluate progress. Thirty-three percent of the teachers re-evaluated students once or twice a year, 17% of the teachers re-evaluated them three to four times a year and 66% re-evaluated much more frequently—8% every week, 25% every two weeks, 8% every month or 25% every six weeks. They used teacher made criterion referenced tests (25%), informal paragraphs and questions (25%), teacher made worksheets (17%), standardized tests (including Roswell-Chall, Gray Oral, Halsman Word Analysis and Durrell) (17%), and review tests and review tests from *Spotlight on Writing* (8%). Other evaluative tools used were: conferences with children (17%); writing samples (17%); close exercises (8%); workbook exercises

tion of the Establishment Clause by coming into a religious school and requiring the school authorities to strip from the walls of several rooms evidence of the religion normally observed in that school and in those rooms is in itself a curious one. It seems clear that an activity which impedes religion is as much a violation of the First Amendment as one which advances it, not to mention the "entanglement" involved in the government's continuous surveillance of the rooms in question to see that they remain stripped of thier [sic] normal evidences of religion.

10. There is, however, a more serious defect in paragraph 5 of the Larkin Affidavit in the light of the exhibits annexed to that document, which, as noted, disclose that there is an ongoing dialogue between Title I teachers and religious school personnel. At first blush, it might appear that the dialogue would concern only the subjects taught in the Title I curriculum (although there is hardly a clear line between reading, writing and arithmetic when taught in a "remedial" way—and when taught, previously or subsequently, in a "regular" way). After only slightly deeper consideration, however, it should become clear that the dialogue in question concerns *how to teach* those subjects, and, more particularly, how to teach them to problem students, since that is what Title I students are.

11. Viewed in this light, the ongoing dialogue between Title I teachers and religious school personnel assumes its proper proportions. In exchanging information and advice, the participants in the dialogue are not only constantly assisting each other in teaching their mutual wards, they are also constantly educating each other about how to teach their wards, and similar types of students, and even all types of students. Assuming, as we must, on the basis of common knowledge and abundant judicial authority, that there is a basically different approach to the educational process in a public school from that in a religious school, and that the latter process is based on values that derive from the religion observed in the school, it follows that the dialogue in question involves

a constant, although subtle "indoctrination" of each set of participants with the values of the other.

12. No one would venture to say which prevail, but it does not matter constitutionally. It is the dialogue and the indoctrination which is the evil. It is made more pernicious, moreover, by a fact which the Larkin Affidavit alleges, that the Title I teachers do not remain long in any one religious school, and presumably they do not remain permanently in religious schools. That fact, if it is the fact, is presumably used in the opposing affidavit in support of the proposition that it reduces the possibility of indoctrination, one way or the other. That would appear to be a doubtful proposition. What is *not* doubtful is that any Title I teacher who has taught in a religious school for any substantial length of time can properly lay claim to having first-hand knowledge of the educational process in that school. For better or for worse, he or she becomes a "missionary," who can say—"I have been there, and I know how it works (or fails to work or compares with public schools)." It seems clear that the First Amendment prohibits the training, intentionally or inadvertently, of government employees as such missionaries, whether they prove to be for or against religious schools.

13. At this point, a *caveat* is necessary. Although plaintiffs believe that the ongoing dialogue between Title I teachers and religious school personnel is proof of one clearly pernicious effect of the entanglement that necessarily results from the Program, it is not intended by submitting such proof to indicate that plaintiffs have the burden of proving the pernicious effects of the entanglement, as opposed to the entanglement itself. As pointed out in plaintiffs' accompanying memorandum of law, the vice in New York City's Title I Program insofar as it applies to religious schools is that it poses the constant threat of violations of the First Amendment which requires a "comprehensive, discriminating and continuing" surveillance of the Title I personnel posted in the religious

schools. *That* is the entanglement, and the ongoing dialogue between Title I teachers and religious school personnel serves to show, without more, how excessive it is in this case.

14. On the subject of surveillance, the Evaluation Reports are also significant. They demonstrate that there is in actual fact no real surveillance from the viewpoint of the First Amendment conducted by those in charge of the New York City Title I Program. There is not a word in the Reports evaluating the Program at year's end which indicates that the author or authors or their assistants asked a single question of the Title I teachers or other Title I personnel posted in the religious schools relating to violations or possible violations of the First Amendment, or that they were concerned with such violations.

15. As indicated above, there is another aspect of the ongoing dialogue between Title I teachers and religious school personnel disclosed in the exhibits annexed to the Larkin Affidavit which bears serious consideration from a constitutional viewpoint. The Evaluation Reports make it clear that the information and advice exchanged by the Title I teachers and religious school personnel is by no means confined to the activities of the Title I students in the Title I classroom or to the curriculum taught in that classroom, but extends to the activities of those students in their "regular" classroom and to the curriculum in that classroom. That aspect of the dialogue might, to some extent, be present in a program of remedial services conducted off the premises of the religious school, but it is compounded when the program is on the premises, and the program teachers are in constant communication with the religious school personnel, familiar with the regular classroom activities and curriculum, and, as noted above, virtually members of the faculty of the religious school.

16. That spilling over makes it impossible to separate the aid given by the Title I Program, as now in force, to

the Title I students, as such students, and the aid given by the Title I Program to the religious schools attended by those students. There is, however, an even more substantial obstacle to apportioning the aid given by any program of remedial services between the religious school students and the school they attend, whether off or on the premises of the religious school. It is clear, and the Evaluation Reports would make it so, if it were not, that the students who need such services would, without the benefit of the same, be a drag on the rest of the student body and, therefore, on the entire educational process in the religious school. Remedial services, therefore, in a direct educational way, help the religious schools, and cannot be sustained on any "child benefit" theory.

17. Lastly, the Larkin Affidavit notes that Title I nonpublic school allocation for the 1981-82 school year is over $20,000,000 and represents 13.5% of the citywide allocation. The amount of that allocation, of course, is in addition to the aid given to the same schools in the form of textbooks (in addition to Title I textbooks), certain instruction materials (again in addition to Title I materials), and to help the schools perform various testing and reporting services, which also runs into millions of dollars. What the Larkin Affidavit does not say, and what is unknown at the present time, except to the aided schools, is the total cost of operating those schools, and, therefore, the percentage the government aid bears to the total cost. It is respectfully submitted that the government aid, inclusive of remedial services, will be so substantial in amount as to make the phrase "establishment of religion," at least insofar as it relates to the maintenance of religious schools in this city, literally true in the narrowest sense of that phrase.

18. In light of the foregoing and in light of the points made and authorities cited in plaintiffs' initial and reply memoranda of law, I respectfully request that plaintiffs' motion for summary judgment be granted, that defendants' cross-motion be denied, and that judgment be en-

tered enjoining the continuation of the New York City Title I Program as now conducted in religious schools.

/s/ Stanley Geller
STANLEY GELLER

Sworn to before me this
27th day of May, 1982

/s/ Melvin J. Nelson
MELVIN J. NELSON

Notary Public, State of New York
No. 60-2864800
Qualified in Westchester County
Commission Expires March 30, 1983

PLAINTIFFS' EXHIBIT A

EXCEPTS FROM
DEFENDANTS' SUPPLEMENTAL EXHIBIT A

(OEE Evaluation Report on Corrective Mathematics Services for 1979-1980)

Page 15 (top)

"*Student Records.* All interviewed teachers kept records of attendance test scores, pupils' progress, students' work, a checklist of skill mastery for each student, *a record of classroom teacher conferences and notes from their meetings with the nonpublic school principals.*" (Plaintiff's emphasis.)

Page 15 (middle)

"*Related Duties.* All of the interviewed teachers identified the following areas as duties related to teaching: administering standardized tests, diagnosing pupil needs, implementing instruction, participating in in-service conferences, preparing and maintaining lesson plans and pupil records, and conferring with parents. Other responses included: preparing instructional materials, organizing classrooms, *conferring with teachers and the principal,* preparing progress reports, listening to student problems, *helping with regular classroom mathematics,* and planning the schedules." (Plaintiff's emphasis.)

Page 15 (bottom)

"*Support Services*

Clinical and Guidance. The survey asked teachers to identify those staff members who referred pupils for clinical and guidance services; 91% checked the Title I Corrective Mathematics teacher, 85%, other Title I non-public school teachers; *83% class-*

room teachers; 75% principals; . . . ." (Plaintiff's emphasis.)

Page 16 (bottom)-Page 17 (top)

"*Nonpublic School Principal.* Eighty-five percent of the surveyed teachers responding to the questionnaire indicated that the nonpublic school principal provided orientation to school procedures. Sixty-two percent reported the principal arranged scheduling, 18% indicated the principal held monthly conferences and 16% checked that the principal arranged conferences with the regular classroom teachers. Most of the teachers interviewed found the principals to be cooperative and available when necessary. Eighty-three percent of the interviewed teachers reported that the principal encouraged coordination with the regular classroom teacher. Sixty-seven percent indicated that the principal also provided support in the areas of orientation to the school scheduling and pupil related conferences."

Page 31

"The school principal is given a copy of each child's September and May Stanford Achievement Test scores. *The supervisor also indicated that teachers maintain an on-going dialogue with the principal.*" (Plaintiffs' emphasis.)

PLAINTIFFS' EXHIBIT B

EXCERPTS FROM
DEFENDANTS' SUPPLEMENTAL EXHIBIT B

(OEE Evaluation Report on Corrective Reading Services for 1979-1980)

Page 8

"*Criteria for Selection.* Interviewed teachers were asked to identify the criteria used for selecting pupils for the Corrective Reading Program. Ninety-two percent of the teachers indicated the criteria provided by the eligibility list were used for selection. Other responses included: severely disabled readers (83%), *classroom teacher recommendations (50%) and principal recommendations (33%).*

Participants in Selection. Survey respondents indicated that the following people participated in the selection process: Title I teachers (92%), the guidance counselor (44%) and other Title I teachers (29%).

All 12 interviewed teachers said the non-public school Title I guidelines were used in the selection of students. *The teachers reported participants in these decisions included the Title I teacher (reported by 75% of the respondents), the classroom teacher (83%) and the school principal (75%).*" (Plaintiffs' emphasis.)

Page 17

"*Clinical and Guidance.* The survey asked teachers to identify all those who referred pupils to the Clinical and Guidance Services: 96% of the teachers indicated the Title reacher; [sic] 88%, *classroom teachers; 82%*, other Title I teachers; *82%, the principal*; and 15%, parents." (Plaintiffs' emphasis.)

Page 18

"*Nonpublic School Principal.* Eighty-two percent of the survey respondents indicated the school principal provided orientation to the school; 61% reported that the principal arranged scheduling; 24% state the principal arranged monthly conferences and 14% that the principal arranged conferences with the regular classroom teachers."

Page 19

"*Classroom Teacher.* Surveyed teachers indicated the purposes for consultation with the regular classroom teacher as: assessing pupil needs and weaknesses, 85%; selecting pupils, 80%; coordinating scheduling, 72%; and motivating the interest of pupils, 42%.

All interviewed teachers consulted with the regular classroom teacher to assess pupil needs and weaknesses and to coordinate scheduling. Seventy-five percent of the teachers added that they use the consultations *to find out what the classroom teachers are teaching and/or coordinate lessons with the classroom teacher.* Other purposes noted were discussions of pupil behavior and the sharing of test scores." (Plaintiffs' emphasis.)

Page 25

"*Coordination with the Regular Classroom Teacher.* The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupils achievement and progress reports are reviewed with *nonpublic* school staff.

Teachers suggested that there should be even more conferences with the regular classroom teachers. It was also suggested that invitations should be ex-

tended to the Title I teachers to attend the nonpublic school faculty meetings." (Plaintiffs' emphasis).

Page 29

"Table 5 lists the observed teacher activities. All of the observed teachers talked with the children about their activities, encouraged and reinforced children in their work and gave feedback to children on their progress. *The evaluator observed that 92% of the teachers helped children solve academic problems and engaged in general discussions with the pupils.*" (Plaintiffs' emphasis.)

Page 35

"Communication between the teachers and the principals is encouraged. The principals must see and sign all the reports to the parents (issued twice a year). They also receive test scores for each group. *In most schools the principals also have informal conferences with the Corrective Reading teachers.*"

PLAINTIFFS' EXHIBIT C

EXCERPTS FROM
DEFENDANTS' SUPPLEMENTAL EXHIBIT C

(OEE Evaluation Report on Reading Skills
Services for 1979-1980

Page 1

"The staff included one full time (FTE)** coordinator, 17 FTE teachers, and one FTE secretary. Each teacher provides a minimum of four hours of instruction per day. *In addition, a one hour conference period was set up each day to be used by teachers to meet with parents, communicate with nonpublic school personnel, and to diagnose individual pupil needs.*" (Plaintiffs' emphasis.)

Page 7

"*Participants in Selection.* All of the surveyed teachers reported that the Title I teacher participated in the selection of the children *for the program. Other responses were nonpublic school principal, 81%; nonpublic school classroom teacher, 63%;* Title I guidance counselor, 50%; and other Title I teachers, 69%." (Plaintiffs' emphasis.)

Page 16

"*Nonpublic School Principal.* Teachers answering the survey indicated they receive support from the nonpublic school principal through orientations to school procedures, 81%; scheduling, 69%; arranging conferences with the regular nonpublic school classroom teachers, 44% and monthly conferences, 19%.

All of the interviewed teachers indicated that the *principal of their school encourages coordination with regular classroom teachers,* provides orientation to school procedures, and makes scheduling de-

cisions. Three interviewed teachers noted that they received support from their principals in the following ways: *the principal's attendance at the monthly conferences*, the principal's respects [sic] for the program, and the principal's assistance in gaining the cooperation of parents, students, and teachers." (Plaintiffs' emphasis.)

Page 19

"*Coordination with Regular Classroom Teacher.* The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with *nonpublic* school staff." (Plaintiffs' emphasis.)

PLAINTIFFS' EXHIBIT D

EXCERPTS FROM DEFENDANTS' SUPPLEMENTAL EXHIBIT D

(OEE Evaluation Report on English as a Second Language for 1979-1980)

Page 7

"*Participants in Selection.* All interviewed teachers identified the Title I teacher as a participant in the selection of children for the program. *Eighty-eight percent of the teachers recognized the classroom teacher* and/or Title I guidelines as a determinant in the selection.

Of the 42 respondents to the survey, 98% indicated that the Title I teacher participated in the selection of the children in the program, 9% *named the nonpublic school principal, 100% selected the classroom teacher,* 17% named the guidance counselor and 43% named other Title I teachers." (Plaintiffs' emphasis.)

Page 10

"TABLE I

Percent of Title I ESL Teachers Using Various Assessments At the Beginning of the Year and During the Year

Assessments	Method used at beginning of the year	Method used during year
Title I program assessment	55%	55%
An informal reading test	2%	10%
A standardized norm referenced test	79%	67%
A standardized criterion referenced test	10%	12%
A teacher made criterion referenced test	52%	50%
Conference with classroom teacher	76%	81%
Classroom observation	0%	74%

(Plaintiffs' emphasis.)

Page 11

"*Student Records.* All interviewed teachers kept records of attendance, pre- and posttest standardized scores, individual profile charts, and pupil's work folders.

Most of the teachers kept records of parent conferences (88%), *conferences with nonpublic school staff (88%)*, and referrals to supportive services." (Plaintiffs' emphasis.)

Page 12 (middle)

"*Support Services.* The results of the survey asking teachers to specify all those who refer pupils to Clinical and Guidance Services were: 98%, ESL Title I teacher; 81%, other Title I teachers; *98%, classroom teachers; 81%, principals*; and 21% parents." (Plaintiffs' emphasis.)"

Page 12 (bottom)

"It was reported by the interviewed teachers that pupils are referred to Clinical and Guidance Services *by the classroom teacher (75%)* or the Title I teacher (63%). *Often the ESL teacher would talk to the regular classroom teacher informally and then decide to jointly request clinical and guidance services.*" (Plaintiffs' emphasis.)

Page 13

"When asked what kind of support they received from the nonpublic school principal, the eight interviewed teachers generally spoke of the principal's cooperation. All of the interviewed teachers indicated that the principal provided orientation to school procedures. Eighty-eight percent of these teachers reported that the school principals encouraged coordination with the regular classroom teachers, initiated or were available for dialogue with the Title I teacher, and took care of scheduling matters." (Plaintiffs' emphasis.)

Page 14

"Interviewed teachers reported that they communicated with parents in a variety of ways: face-to-face (63%); telephone (38%); written communication/written progress reports (100%); parent-tutorial (13%); *and through the classroom teacher (13%)*.

Initiation. Eighty-three percent of the Title I teachers indicated on the survey that they initiated the majority of teacher-parent contacts. *In addition, 5% named the nonpublic school classroom teachers*; 7% indicated the parents; and 2% reported the pupils initiated the majority of parent-teacher contacts." (Plaintiffs' emphasis.)

Page 16 (top)

"*Coordination with Nonpublic School Classroom Teachers.* The Title I teacher confers periodically with the nonpublic school classroom teacher to ascertain the specific needs and weaknesses of the assigned pupils. Evaluation of pupil achievement and progress reports are reviewed with nonpublic school staff."

Page 16 (middle)

"*Coordination with Regular Classroom Teachers.* The coordination with the regular classroom teacher, although informal, was *ongoing* and flexible. One teacher suggested the regular classroom teacher could observe some ESL classes." (Plaintiffs' emphasis.)

Page 21

"*Student Considerations*

Reporting of Student Progress. Student progress is reported to students by immediate feedback and unit-end assessments. Feedback is given to parents

at various times during the year through progress reports (See Appendix), parent meetings, and demonstration lessons. *The principal as well as the classroom teacher gets on-going feedback on the progress of the pupils.*" (Plaintiffs' emphasis.)

Page 23

"*Coordination with Regular Classroom Teachers.* Although there is informal contact, the program coordinator suggested that structures be studied within the constraints of the present regulations to increase the communication between the ESL teacher and the regular classroom teacher."

Page 24

"A recommendation voiced by 26% of the teachers and the program coordinator was that efforts be made, within the program guidelines, to increase communications between the classroom teachers and English as a Second Language. *The evaluation team supports this recommendation.*" (Plaintiffs' emphasis.)

PLAINTIFF'S EXHIBIT E

EXCERPTS FROM
DEFENDANTS' SUPPLEMENTAL EXHIBIT E

(OEE Evaluation Report
on Clinical and Guidance
Services for 1979-1980)

Page 1

"Students entered the Clinical and Guidance Program through referrals by the Title I instructional teacher, *the nonpublic school classroom teacher or the principal.*" (Plaintiffs' emphasis.)

Page 2

"*Nonpublic school classroom teachers* and Title I instructional teachers were invited to case conferences and were involved in formulating treatment plans." (Plaintiffs' emphasis.)

Page 10

"*Activities And Duties*

All of the clinical and guidance personnel were asked to specify their duties and activities. The response of the one school social worker interviewed was: (1) to encourage teachers to respond to the child through individualized approaches; (2) to encourage parents to respond to the child through individualized approaches: (3) to counsel parents, students, *teachers and principals*; (4) to make referrals to other community agencies; (5) visit homes (6) to study the family and life situations of the child to identify problems; (7) to provide individual and group therapy to students; and (8) to counsel the learning disabled child and family." (Plaintiffs' emphasis.)

Page 12

"Response was fairly consistent to the question, "When you are working with pupils to enhance their academic functioning, what adults do you involve in your treatment plan?" *All* clinical and guidance personnel indicated the parents and/or family, the Title I referring teacher *and the regular classroom teacher. Most named the principals* and some interviews also mentioned other clinical and guidance staff and the Title I instructional staff." (Plaintiffs' emphasis.)

Page 13

"*Coordination with Regular Classroom Teachers. Most of the interviewers said they meet with the regular classroom teachers informally,* usually at lunch, since many teachers in the nonpublic schools do not have any free time. In addition, one teacher mentioned the importance of have [sic] definite times scheduled at the beginning of the school year for student appointments in order to facilitate cooperation between the Title I clinical and guidance staff *and the nonpublic school classroom teacher.*

Classroom teachers are invited to all case conference at which time individual student progress is assessed. Classroom teachers are also involved in formulating comprehensive treatment plans." (Plaintiffs' emphasis.)

Page 15 (top)

"*How Students were Referred. Students were referred to clinical and guidance services by the Title I instructional teacher, the regular classroom teacher and/or the nonpublic school principal.*" (Plaintiffs' emphasis.)

Page 15 (bottom)

"*How Students Were Reassessed.* The child's progress was discussed with the Title I instructional teacher *and regular classroom teacher*; recommendations for different approaches were made if the child was not improving. This reassessment was done *on a regular basis.*" (Plaintiffs' emphasis.)

Page 16

"*Staff Considerations.*

"*Staff Involvement with the Title I Teacher and the Regular Classroom Teacher. A team approach was used.* Clinical and guidance staff met with Title I teachers *and the regular classroom teachers* to discuss individual cases." (Plaintiffs' emphasis.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education, and Welfare, ET AL., DEFENDANTS

and

JAMES and BESSIE BOVIS, ET AL., INTERVENOR-DEFENDANTS

and

PHILIP and IDA FENSTER, ET AL., INTERVENOR-DEFENDANTS

AFFIDAVIT OF REVEREND MONSIGNOR JOHN J. HEALY

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

REVEREND MONSIGNOR JOHN J. HEALY, being duly sworn, deposes and says:

1. I am the Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York. My administrative responsibilities include overseeing the education of 140,630 stu-

dents in the Catholic elementary and secondary schools in the Counties of Richmond, New York, Bronx, Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Secretary of Education of the Archdiocese of New York since August 1, 1978. From January 1, 1976, to July 31, 1978, I served as Deputy Secretary of Education. Prior to 1976, I served as Associate Secretary of Education.

4. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the operation of the Catholic elementary and secondary schools within the Archdiocese. There are 287 Catholic elementary schools and 69 Catholic secondary schools in the ten counties that constitute the New York Archdiocese. Of that total number of schools, 159 Catholic elementary schools and 48 Catholic secondary schools are located in the Counties of New York, Bronx and Richmond, counties within the Archdiocese for which the New York City Board of Education has responsibility for the operation of the public school system. Approximately 95,698 students are enrolled in the Catholic elementary and secondary schools in those three counties.

5. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the programs of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in New York City under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) (hereinafter "Title I"). According to information compiled by the New York City Board of Education for the 1977-1978 school year, 15,109 students attending 97 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island were eligible,

on the basis of economic and educational deprivation, to receive Title I services during that school year. Of the eligible Title I students in those schools, 7,781 actually received Title I remedial services.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the Catholic elementary and secondary schools in the Archdiocese of New York did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Archdiocese of New York, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), which invalidated programs of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Archdiocese of New York, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. Before addressing the specific elements of the "profile" contained in the *Nyquist* and *Levitt* decisions, a few general observations about the Catholic elementary and secondary schools under my supervision are appropriate. The focus of the general and specific observations which follow is on those Catholic elementary and secondary schools which have Title I programs. Because those schools are located in the inner city and have significant non-Catholic student populations, they have characteristics that defy stereotyping.

9. The underlying objective of the Catholic elementary and secondary schools under my supervision is to provide a sound education to their students so that those students can become responsible, productive and moral citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we add to an otherwise complete education instruction in religion, and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

10. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators are aware that such a concern is not theirs exclusively. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher can ignore the value implications of what might otherwise be considered a secular subject matter. For example, any treatment in a social science class of the civil rights movement of the past 20 years involves the teacher in forming a value judgment on the dignity of individual persons. The "religious" values that are addressed in Catholic elementary and secondary schools, and particularly those with a significant non-Catholic student population, are not narrowly parochial or sectarian in nature, but rather more

broadly Christian in recognition of the Judeo-Christian heritage of this nation. Our schools also constantly stress moral, as distinct from precisely religious, values. These include responsibility, tolerance, brotherhood, thoughtfulness and studiousness.

11. The concern for religion and religious values which is central to the philosophy of Catholic schools in no way dilutes or distorts the content of what would be considered secular, as opposed to religious education, courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

> "Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man." *The Catholic School*, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition—namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

12. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

> a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which offers at least the following courses: mathematics, reading, writing, English language, geography, U.S. history, civics, health education,

physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students can perform satisfactorily on standardized tests provided by state officials to both public and nonpublic school students.

b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described above. The obligations of our schools extend far beyond the religious needs of our students—they extend to their temporal requirements. We would be failing in our obligations as educators and would have no right to sponsor schools if we did not provide our students with that education which is necessary for them to be responsible and productive citizens.

That Catholic schools teach secular subjects both objectively well is attested by the readiness of public and private high schools, colleges and universities to admit graduates of those schools.

13. Against this background of the general educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address the specific characteristics of the "profile" of those schools which the Supreme Court used to decide the *Nyquist* and *Levitt* cases.

Religious Mission

14. One of those characteristics is that the schools that the Court was examining were "an integral part of the religious mission of the church sponsoring it." While the words quoted are, standing alone, unobjectionable as a description of the motivation of many persons who sponsor our schools, they are misleading in the inferences that the Supreme Court drew from them as a character-

istic of the educational process of Catholic elementary and secondary schools. They are especially misleading for the Catholic schools that have Title I programs provided by the New York City Board of Education.

15. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes and a diocese is consistent with that generosity which is central to the mission of the Roman Catholic Church and mandated by its Founder. But so is the care of the hungry or the ill-housed, and motivation in no way clouds or dilutes such assistance. The difficulty lies in defining the precise nature of that religious mission relative to educating children in need of remedial instruction.

16. In this regard, a central fact about Catholic elementary and secondary schools is that they are community-based—that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community and which draws its students from that community. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of their communities. These factors can, do and should affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the diocesan level covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and the skills of its population. Indeed, in many of the schools in the Archdiocese, those policies and goals are implemented by parish school boards that are composed of the parents of students, who in Title I schools include a number of non-Catholics.

17. The eligibility requirements for student participation in Title I remedial programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner

city." That fact, which is essential to understanding the work of Title I Catholic elementary and secondary schools, necessarily defines the educational mission of the schools which is in no way compromised by the religious motivation that is the foundation of the desire to serve the ill-educated, as much as it is to serve the ill-fed.

18. Because they are located in inner-city communities, the Title I schools in Manhattan, the Bronx and Staten Island draw their students from highly concentrated minority populations. When those schools are located in certain areas in the inner city, the population from which the students are drawn is overwhelmingly Black and contains a large number of non-Catholics. The majority of the students attending several Catholic elementary schools in areas with large Black populations are not of the Roman Catholic faith.

19. Moreover, while the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Archdiocese has found it necessary over the past seven years to provide a subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. The Archdiocesan Commission for Inter-Parish Financing has distributed approximately $2.5 million each year, principally to parishes which operate schools with Title I programs. Ninety percent of the money has been used to defray deficits incurred by the Title I schools. In the 41 elementary schools receiving funds from the Commission for Inter-Parish Financing, there are 16,245 students, of which 2,623, or approximately 16 percent, are non-Catholic. In addition, the Archdiocese has an Inner City Scholarship Fund which has awarded scholarships exclusively to students at 56 inner-city schools with Title I programs in Manhattan and the Bronx. During the 1978-1979 academic year, some $300,000 was provided by that Fund for tuition subsidies for students in those Title I schools.

20. In light of the fact that there are substantial diocesan subsidies to inner-city Title I schools with significant non-Catholic student bodies, a question arises as to what "religious" mission the Archdiocese is fulfilling in maintaining such schools. The answer is clear to those who understand the deep concern that the Catholic Church, in general, and Catholic educators, specifically, have for those people who are victims of economic deprivation, whether they are Catholic or not. The mission is one of social and community action, which is reflected in the willingness of the Catholic Church to divert its resources from strictly religious activities to aid those who are the victims of social, economic and cultural disadvantage or racial discrimination. A long-standing mission of the Roman Catholic Church has been to alleviate the effects of social injustice, and that mission is fulfilled in part by the continued operation of inner-city Title I schools for the benefit of the community, irrespective of whether those schools serve a predominantly Catholic population.

Obedience to Doctrines and Dogmas

21. Another of the characteristics of the "profile" of Catholic elementary and secondary schools contained in the *Nyquist* and *Levitt* decisions is that they "require obedience by students to the doctrines and dogmas" of the Catholic faith. I can state unequivocally that no Catholic school under my supervision has any such purpose or serves any such function.

22. While the religious education provided by Catholic elementary and secondary schools reflects a concern that students receive, in their normal educational setting, an exposure to the teachings of the Roman Catholic Church and Christianity in general, it is not the function of a school to compel its students to believe anything, religious or otherwise. The purpose of a school is strictly to provide its students with the information and means

of analysis so that they can come to a better understanding of the subject matter, whether that subject matter is religious or secular in nature. Our schools would be untrue to their functions as educational institutions if they sought to compel students to accept one religious viewpoint or another, just as they would be shirking their responsibility if they compelled the students to accept one interpretation of Shakespeare rather than another or one explanation for the American Civil War rather than another.

23. Our schools would not only diminish their standing as quality educational institutions if they sought to compel obedience of students to the doctrines and dogmas of the Roman Catholic Church. They would also be acting contrary to the very doctrines of that Church. A central principle of Roman Catholic theology is that religious faith must be freely given and freely accepted. Under that precept, nothing may be done by the Church, or anyone acting on its behalf, that would seek to coerce the conscience. Thus, those responsible for the operation of Catholic elementary and secondary schools would be untrue to their own beliefs if they sought to compel the students to obey the doctrines and dogmas of the Church.

Inculcation of Religious Values

24. A third characteristic of the "profile" schools in the *Nyquist* and *Levitt* decisions was that they had "as a substantial purpose the inculcation of religious values." That characteristic is neither a purpose nor a function of the Catholic elementary and secondary schools under my supervision.

25. The word "inculcate" has connotations which are inconsistent with the educational process. It suggests both in its connotations and literal definition an effort to induce students to accept ideas or values through coercion. Our schools do not engage in that activity, whether religious values or other aspects of learning are involved.

26. By denying that our schools "inculcate" religious values, I do not mean to suggest that exposure of students to religious values is in any way foreign to our schools or our educational program. Our schools have as a central concern that students be aware of Catholic values and examine those values critically. That concern is expressed not only in our religious education classes, but also in our practice of examining the relationship of religious or moral values to the entire learning process where such values are relevant to the subject matter. But we do not seek to force our students to adopt religious values that they cannot or do not freely accept.

Admission Requirements

27. A further characteristic of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "impose religious restrictions on admissions." The Title I Catholic elementary and secondary schools under my supervision do not operate under any such restrictive admissions policy.

28. Because most of the schools under my supervision are supported by the revenues of the parishes which sponsor them, preference in admissions is given to children of those persons who provide revenue to the parish —namely, parishioners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children of those Catholic parents.

29. However, once the needs of the children of parishioners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Indeed, the prevailing policy is to give preference, after the needs of children of parishioners are met, to others living within or close to the geographical boundaries of the parish. By definition, the second level of preference is for students who are not of the Catholic faith.

30. That these policies do not restrict admissions on religious grounds is most dramatically illustrated by the Title I Catholic elementary and secondary schools under my supervision. Of the approximately 34,000 students enrolled in the 79 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island which have Title programs on their premises, approximately 14.7 percent are of a religious faith other than Catholic. The percentage of non-Catholic students in the Title I schools is even higher in those areas with predominantly Black and Asiatic populations. For example, several Title I schools serving those communities have student populations that are more than 60 percent non-Catholic.

31. The predominance of Catholic students in the enrollment statistics is a natural consequence of our desire to see that children of those who support the parish, which supports the school, should in equity have free access to those schools. However, those schools remain community-based and welcome all members of the community to the school when the needs of parishioners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, the consequence of our admissions policy is to invite significant numbers of non-Catholics to be educated in our schools.

Faculty Hiring Policies

32. Another aspect of the "profile" schools described in the *Nyquist* and *Levitt* decisions is that they impose "religious restrictions on faculty appointments." To my knowledge, teaching positions in the Catholic elementary and secondary schools under my supervision are not restricted to Roman Catholics. Hiring is a responsibility of the individual schools; the Archdiocesan office serves simply as a clearinghouse for applicants who are seeking teaching positions in the Catholic elementary and secondary schools. The Archdiocesan school office retains a file of applications, and the names of qualified applicants

are made available to individual schools as teaching positions become available.

33. The teacher application form currently used by the Archdiocese requests information concerning the religious affiliation of the applicant. No application is rejected and no applicant is denied referral to a school because he or she is of a religious faith other than Roman Catholic.

34. Individual schools have broad latitude in deciding whether or not to hire an applicant referred to them by the Archdiocesan school office. Under Archdiocesan policies, no applicant is referred who does not have sound academic qualifications, a matter of primary consideration. As a matter of Archdiocesan policy and practice by individual schools, no person will be hired for a teaching position if he or she is openly hostile to the Roman Catholic Church or its belief system. Barring such aggravated sentiments, non-Catholic applicants experience no discrimination in the hiring process. In the employment interview, all applicants are made aware of and asked if their consciences would allow them to cooperate with the policies of the school, the religious education program, value education and the general Catholic atmosphere of respect for each other, for learning and for God.

35. I am aware that there are teachers employed by Catholic elementary and secondary schools under my supervision who are not Roman Catholics. This is particularly true in schools with significant numbers of Black students, where role models are important and where there are very few Black Catholics with the requisite academic qualifications to draw from. The precise number of non-Catholics teaching in Archdiocesan schools is difficult to determine because the school census cards received by my office do not classify teachers by religious affiliation. However, an inquiry of a random sample of Title I schools revealed that 15 non-Catholics were teaching in the schools contacted, and I am aware that is not the total number of non-Catholic teachers in our system.

For example, I know that 20 of a total of 359 lay teachers employed by Archdiocesan high schools are not Catholic. Unlike parish elementary schools, the direct administration of those high schools is a function of the Archdiocesan office. These statistics amply demonstrate that the schools of the Archdiocese do not restrict the hiring of teachers on religious grounds.

Religious Restrictions on Course Content

36. Another feature of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "impose religious restrictions on what or how the faculty may teach." That characteristic does not accurately describe the Catholic elementary and secondary schools under my supervision.

37. The emphasis in the religious education classes in the overwhelming majority of the schools under my supervision is on the teachings of Christianity as the Roman Catholic Church formulates them. Those responsible for teaching the religious education classes must have a thorough understanding of the teachings of the Roman Catholic Church and are required to teach them accurately, not presenting anything as Catholic doctrine which is not factually so. This restriction, however, does permit and indeed encourages those responsible for religious education to explain the positions taken by other Christian denominations or other religious faiths on particular issues that are within the purview of the religious education curriculum.

38. There are no religious restrictions on the secular content of the secular subjects offered in the Catholic elementary and secondary schools under my supervision. The secular content of those secular courses has its own academic integrity, and it would be a gross distortion of the educational process to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church.

39. It is true, of course, that in the educational process there is not always a sharp line dividing the secular

from the religious. In history, for example, a large part of the story of the development of Western civilization is the story of the impact of Christianity on Western civilization. Of necessity, the course in Western Civilization will touch upon the conflicts that divided the Christian Church into various denominations and sects. If the historian's objective account of the precise points of conflicting theological dogma is inconsistent with the Roman Catholic theologian's account, the reconciliation, if there is to be one, should be made by the theologian and not the teacher of history. However, the teacher who must include an historical account of the Reformation in a class in one of the schools under my supervision would be expected to give the account that is most consistent with the best available historical materials and not necessarily the account that is consistent with a Roman Catholic theologian's view of the Reformation.

40. Some of the secular subjects taught in the schools under my supervision also touch questions of morals and values. Teachers are not restricted on how they approach such subject matter, but are encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework and not to shun those issues.

Attendance at Religious Instruction

41. An additional feature of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "require pupils to attend instruction in the theology or doctrine of a particular faith." It is true that all students enrolled in the schools of the Archdiocese take a course in religion as a part of the curriculum. However, to the extent that this characteristic of the "profile" implies that the content of the religious instruction offered is narrowly sectarian in content or is taught to compel adherence by students to particular religious beliefs, it does not accurately portray the schools under my supervision.

42. As previously explained in this affidavit, courses in religious education are a regular part of the curriculum of the schools under my supervision and the emphasis in those courses is on the teachings of Christianity as the Roman Catholic Church formulates them. Parents of children who are not members of the Roman Catholic faith are informed of these features of the curriculum prior to enrollment.

43. The religious instruction offered in the schools under my supervision is not limited to the specific doctrines and dogmas of the Roman Catholic Church, although religious teachings and beliefs that are peculiar to the Roman Catholic Church are explained to the students. However, the Roman Catholic Church is part of a much broader Christian community, and the religious instruction in the Archdiocesan schools includes much of what the Roman Catholic Church shares with other Christian denominations. In addition, religious teachings of other denominations that conflict with Roman Catholic teachings are explained to students so that they will have a better understanding of the nature of religious belief.

44. Moreover, a central goal of the religious instruction program is to show students the importance and value of services to others. Thus, as an extension of the religious instruction program, students are encouraged to participate in tutoring younger students, visiting elderly persons who are shut-in or hospitalized, and activities such as Red Cross Walk-a-Thons and the Cerebral Palsy reading program.

45. No effort is made in the religious education courses offered by the schools under my supervision to compel any student, whether Catholic or of some other religious faith, to accept as valid or to adhere to the beliefs of the Roman Catholic Church. Those beliefs are explained and explored in the religious education classes in the same manner that other subject matter taught in those schools is explained and explored, and students are

free to accept or reject those beliefs according to their own consciences.

46. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools under my supervision for a variety of reasons. One of their motivations is that they themselves are strongly religious people—whether they be Baptists or Muslims or Buddhists—and they wish their children to be exposed to religious values. They enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children and not because they want their children exposed to any proselytizing efforts by the schools. In confirmation of this fact, to my knowledge there has never been an instance of a non-Catholic student removed from a Catholic elementary or secondary school because the student was forced to believe or engage in a religious practice in violation of that student's own conscience or belief system.

Attendance at Religious Activities

47. A final characteristic of the "profile" schools in the *Nyquist* and *Levitt* decisions is that they "require attendance of pupils at religious activities." The Catholic elementary and secondary schools under my supervision engage in that practice. However, non-Catholic students are not permitted to participate in some religious activities, such as reception of the Sacraments.

48. Most of the Catholic elementary and secondary schools under my supervision have some form of religious observance as part of the school day. Most typically, that religious observance will be in the form of a prayer recited at the beginning or the end of the school day, or before instruction begins in a particular class. In addition, during regular school hours on an occasional basis most schools will schedule more formal liturgical observances, such as attendance at Mass by a class or the

entire school. All students enrolled in the schools are expected to be present for such religious observances, but the degree or extent to which they participate in those observances is a matter of conscience for the individual student, and that freedom of conscience is scrupulously observed by teachers.

49. The parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registration that their children will be expected to be present for the types of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that the student's participation in those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

50. I have attempted in this affidavit to describe accurately the policies and practices of the Catholic elementary and secondary schools under my supervision as they relate to the various characteristics of the "profile" schools that the Supreme Court described in the *Nyquist* and *Levitt* decisions. As the information I have supplied should make clear, the schools under my supervision depart significantly from the schools of the "profile." That is particularly true of those schools which have Title I programs under the auspices of the New York City Board of Education—schools which have a significant number of non-Catholic students.

51. By distinguishing those schools from the characteristics of the "profile" schools, I do not intend to deny that those schools serve religious functions or have religious objectives. However, where the "profile" attempts to portray such schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or compelling them to subscribe to the beliefs of the Roman Catholic Church, the "profile" distorts

and misstates the total educational mission of those schools.

52. The basic objective of the Catholic elementary and secondary schools under my supervision, including those with Title I programs, is to provide their students with a sound education in an environment in which the students are exposed to religious education and religious values. Our goal is to produce students who have the knowledge and intellectual skills to be responsible and productive members of their communities and who are also aware of the religious heritage of our society.

/s/ John J. Healy
REVEREND MONSIGNOR JOHN J. HEALY

Subscribed and sworn to before me
this 22 day of March, 1979.

/s/ Josephine Raymond
JOSEPHINE RAYMOND

Notary Public, State of New York
No. 31-8505425
Qualified in New York County
Commission Expires March 30, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 888 (CHT)

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, Secretary of the United States Department of Health, Education and Welfare, ET AL., DEFENDANTS

and

JAMES and BESSIE BOVIS, ET AL., INTERVENOR-DEFENDANTS

and

PHILIP and IDA FENSTER, ET AL., INTERVENOR-DEFENDANTS

AFFIDAVIT OF REVEREND VINCENT D. BREEN

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

REVEREND VINCENT D. BREEN, being duly sworn, deposes and says:

1. I am the Superintendent of Education of the Roman Catholic Diocese of Brooklyn. My administrative responsibilities include overall supervision of the education of approximately 125,000 students in the elementary and secondary parochial schools in the Counties of Queens and Kings.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Superintendent of Education for the Diocese of Brooklyn since June 1978. For two years prior to my appointment as Superintendent of Education, my title was Superintendent of Schools for the Diocese. Prior to that time, I served as Associate Superintendent of Schools from September 1, 1973, to June 30, 1976, and as Assistant Superintendent of Schools from October 1, 1966, to August 31, 1973.

4. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the operation of the Catholic elementary and secondary schools within the Diocese. There are 178 Catholic elementary schools and 24 Catholic secondary schools in the two counties that constitute the Diocese. The public schools in those two counties are under the jurisdiction of the New York City Board of Education.

5. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the program of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in Kings and Queens Counties under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) (hereinafter "Title I"). According to information supplied by the New York Board of Education, 12,913 students in 79 Catholic elementary and secondary schools in Kings and Queens Counties were eligible during the 1977-1978 school year, on the basis of economic and educational deprivation, to receive Title I services. Of the total eligible students, 7,726 actually received Title I remedial educational services during that school year.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the the Catholic elementary and secondary schools in the Diocese of Brooklyn did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for

any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Diocese of Brooklyn, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), which invalidated programs of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Diocese of Brooklyn, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. The Catholic elementary and secondary schools under my jurisdiction seek to provide, above all, a sound education to their students so that those students can become useful, productive and concerned citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we insist that instruction in religion be a part of the regular school day and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

9. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators recognize that such a concern is not their exclusive province. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher should ignore the value implications of secular subject matter. So, in social studies programs in the public schools in New York City the question of the horrors of the Holocaust is considered and involves both teachers and students in coming to a value judgment about the Nazi treatment of the Jews during World War II. When the question of slavery is taught in history classes concerned with the Civil War, students must also examine similar value questions about the treatment of Blacks in their own country. While religious instruction is given in all Catholic elementary and secondary schools which emphasizes the teachings of Roman Catholicism, the religious and moral values that are addressed in other subjects, particularly in those schools with a significant non-Catholic student population, are not simply Catholic but include more broadly Christian values in recognition of the Judeo-Christian heritage of this nation.

10. The concern for religion and religious values which is central to the philosophy of Catholic schools does not, however, dilute or distort the content of what would be considered secular, as opposed to religious, education courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

> "Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which

> help to develop his personality and lead him to take his place as an active member of the community of man." *The Catholic School*, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition—namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

11. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

> a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which includes at least the following courses: mathematics, reading, writing, English language, geography, United States history, civics, health education, physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students, when they leave school, are prepared to enter into the society with skills and knowledge comparable with other members of society.
>
> b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described. We would be failing in our obligation as educators if we did not provide our students with the education necessary for them to be responsible and useful citizens.

12. Against this background of the general educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address more specifically the nature of our Catholic

schools, particularly Catholic schools whose students participate in the Title I program.

The Mission of Catholic Schools

13. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes is consistent with the religious mission of the Roman Catholic Church. However, that religious mission of the Roman Catholic Church is very broad in its scope. Our schools are aware that Jesus told his followers to teach all nations. Our schools have interpreted that command to mean that education—both religious and secular—is important to mankind, and they are seeking to fulfill that need. However, we also know that Jesus told us to "feed the hungry, give drink to the thirsty, clothe the naked." Thus the Roman Catholic Church offers services to those who are afflicted, assists those who are in need and comforts those who are unhappy, whatever their race or creed. The religious mission of the Catholic Church, therefore, includes both educational and social concerns.

14. The essential fact about Catholic elementary and secondary schools is that they are community-based—that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community with geographical boundaries and which draws its students from the members of the community residing within those geographical boundaries. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of the community in which they exist. These factors can and do affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the Diocesan level, covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and skills of its population. The religious mis-

sion of each Catholic parish is to meet the needs of its parishioners—both educational and social—as they are reflected in the needs and circumstances of the local population.

15. The eligibility requirements for student participation in Title I remedial education programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner city." To understand the mission of Catholic elementary and secondary schools whose students receive Title I services, it is essential to define the community that is being served and the mission which those parishes fulfill in operating schools in those communities.

16. Because they are located in inner-city communities, the Title I schools in Kings and Queens draw their students from a highly concentrated minority population. When those schools are located in such areas as Bedford-Stuyvesant, the population from which the students are drawn is overwhelmingly Black. It is a fact that a small minority of the American Black community is Roman Catholic. Consequently, Catholics constitute a minority of the total population of Bedford-Stuyvesant. Nevertheless, Catholic parishes in Bedford-Stuyvesant continue to operate elementary schools and, as a consequence, now serve a student population that is approximately 40 percent non-Catholic.

17. While the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Diocese of Brooklyn has found it necessary over the past 13 years to provide an additional Diocesan subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. This subsidy is necessary because the parishes do not have sufficient funds to provide a full subsidy for the operation of their schools. Over the past 13 years, the Diocese of Brooklyn has contributed, in addition to the subsidies of each individual parish, a

Diocesan subsidy amounting to almost $11 million. Virtually all of the money has been used to defray deficits incurred by schools with Title I programs. In Bedford-Stuyvesant alone, where a significant number of non-Catholic youngsters are attending our schools, the Diocesan contribution to the operation of those schools has been over $2 million.

18. It is evident that the religious mission which both parishes and the Diocese are fulfilling in the operation of these schools and for which the Diocese and parishes are expending such large sums of money relates to the educational, as well as the social, mission of the Catholic Church. Those parishes, with the support of the Diocese, have chosen to offer to the students of the inner city a value-laden educational program of high quality. The services are offered despite the fact that the number of Catholic students is not sufficient to fill these schools. Thus, the religious mission of the parishes in sponsoring those schools is a reflection of the educational and social needs of those communities and the educational and social concerns of the Roman Catholic Church.

19. One of the characteristics of the "profile" of the parochial schools discussed by the Supreme Court in its decisions in *Committee for Public Education* v. *Nyquist*, *supra*, and *Levitt* v. *Committee for Public Education*, *supra*, is that those schools were "an integral part of the religious mission of the church sponsoring" them. If that element of the "profile" was intended to address the motivation of the Diocese of Brooklyn in maintaining schools with Title I programs that serve a significant non-Catholic student population, I have no quarrel with applying that description to the schools under my supervision with Title I programs. However, if that element of the "profile" is meant to suggest that those schools exist solely for narrow parochial or sectarian purposes, I would take issue with such a characterization of the schools under my supervision which have Title I programs on their premises. As I have just explained, the

mission of the parishes sponsoring community-oriented schools with Title I programs is as much educational and social as it is religious.

Admissions Practices

20. Since meeting the needs of the communities in which they are located is an important element in the operation of our Catholic inner-city elementary schools and secondary schools, the admissions policies for these schools reflects that factor.

21. Because all of the schools under my supervision are supported, at least in part, by revenues of the parishes which sponsor them, preference in admission is given to children of those persons who provide the revenue to the parish—namely, parishoners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children or parishoners.

22. However, once the needs of children of parishoners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Thus, the remaining seats are available to members of the community and reflect, therefore, the ethnic, cultural, economic and religious profile of that community.

23. The information regularly supplied to my office by individual schools does not show the religious composition of their student bodies. However, a special survey conducted at the request of counsel and completed in June 1976 collected such data for the 75 elementary and secondary schools in the Brooklyn Diocese that had Title I programs on their premises. I have no reason to believe that the figures revealed by the survey have changed significantly since the survey was conducted. The survey showed that the 75 schools had a total student population of 39,194. Of that enrollment, 2,889 students, or 7.4 percent of the total, were non-Catholic. The four schools of the Brooklyn Diocese with Title I

programs that are located in Bedford-Stuyvesant and East New York, where there are large Black populations, had non-Catholic student enrollments of 41, 43, 48 and 58 percent, respectively. The enrollment in those schools, therefore, reflects to a significant degree the racial and religious composition of communities in which they are located. Similarly, one-third of the total enrollment in the four schools of the Brooklyn Diocese in South Jamaica and Springfield Gardens is non-Catholic. Again, those communities have a large Black population, and the number of non-Catholics in the four schools reflects the composition of those communities.

24. The preference for Catholic students in the admissions process is a natural consequence of our desire to see that children of those who support the parish which supports the school should have free access to these schools. However, those schools are strongly community-oriented and admit students from all segments of the community after the needs of parishoners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, as in the case with many of the schools of the Brooklyn Diocese with Title I programs on their premises, the consequence of the admissions policies of those schools is to admit significant numbers of non-Catholics to be educated in those schools.

25. Another element of the "profile" of the parochial schools described in the *Nyquist* and *Levitt* decisions was that those schools "impose religious restrictions on admissions." As is evident from the statistics that I have referred to, the schools in the Brooklyn Diocese with Title I programs on their premises generally do not, as a matter of policy and practice, restrict admissions on religious grounds.

Curriculum

26. The curriculum offered in the elementary and secondary schools of the Brooklyn Diocese contains all of

the secular courses prescribed by New York State law and also includes courses in religious instruction. In all courses offered in those schools, questions of religious and moral values are examined when they are relevant to the subject matter being taught. It is the inclusion of religious instruction as part of the regular curriculum and the value-oriented nature of that curriculum which, in my opinion, makes Catholic schools distinctive.

27. There are no religious restrictions on the secular content of the secular subjects offered in the elementary and secondary schools of the Brooklyn Diocese. Those responsible for the education offered in those secular courses are committed to the search for truth, and are not restricted in that search by any religious restraints. The secular content of the secular courses has its own academic integrity, and it would be a gross distortion of the educational process of our schools to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church. Thus, our schools do not "impose religious restrictions on what or how the faculty may teach," as the Supreme Court assumed the parochial schools described in the "profile" in the *Nyquist* and *Levitt* decisions did.

28. It is true, of course, that there is not always a sharp line dividing the secular from the religious in the educational process. In the study of history, for example, a large part of the story of the development of Western civilization is the story of the impact of Christianity on that civilization. Of necessity, therefore, the course in Western Civilization will touch upon the history of Christianity and upon the conflicts that have divided Christianity into various denominations and sects. The history teacher's objective and role in our schools is to present an objective account from the point of view of the discipline of history of those conflicts. If that objective account of the conflicts is inconsistent with an account offered by Roman Catholic theologians, any reconciliation of those inconsistencies, if there is to be a rec-

onciliation, should be made by the theologian and not the history teacher, for it is the theologian who is most academically qualified to explain the points of difference on questions of faith and morals among the various Christian denominations.

29. Some of the secular subjects taught in the elementary and secondary schools in the Brooklyn Diocese, of necessity, touch upon questions of morals and values. While teachers are not restricted on how they treat those matters of morals and values, they are encouraged to address directly such matters and not shun them.

30. The teachers in the elementary and secondary schools of the Brooklyn Diocese do not engage in any effort to inculate students in specific religious or moral values. The concept of "inculcation" is simply inconsistent with the educational process. That concept suggests, both in its connotations and literal definition, an effort to induce students to accept ideas or values through coercion. The schools under my supervision do not engage in that activity, whether religious values or other aspects of learning are involved. Thus, the schools under my supervision do not have "as a substantial purpose the inculcation of religious values," a characteristic attributed to the parochial schools in the *Nyquist* and *Levitt* decisions when the Supreme Court described the "profile" of those schools.

31. While our schools do not seek to "inculcate" religious values, they do make a conscious effort to make students aware of such values so that they will be better citizens. Many of the values that are addressed are expressed in the teachings of the Roman Catholic Church. However, many of those values—such as justice, respect for the dignity of other persons and racial tolerance—are also shared by other religious denominations and our society in general. The purpose of examining those values in all aspects of the curriculum where they are relevant is to bring students to an understanding of those values and, if they freely choose, a commitment

to those values. Such an objective in no way differs from the efforts of the public schools to bring their students to a free commitment to such values as patriotism, honesty and truth in their dealings with others. The study of the horrors of the Holocaust in the social studies program of the New York City public schools is specifically intended to show students that religious and racial intolerance is an evil to be abhorred. It is also intended to encourage the students to commit themselves to the values of tolerance, justice and concern for others in society. The explicit value orientation of the curricula in the schools of the Brooklyn Diocese has a similar objective.

32. I should also note that the values that are addressed in the curricula of the schools of the Brooklyn Diocese are not exclusively or narrowly religious in nature. For example because those schools, including the schools with Title I programs, reflect the needs and aspirations of the communities in which they are located, the elementary and secondary schools of the Brooklyn Diocese which are located in communities with large ethnic populations will orient their curricula to take account of the ethnic concerns of the communities. Thus, a Diocesan school located in a predominantly Black community gives special attention to topics such as Black studies and Black history. Dealing with those ethnic concerns is as much a statement of values as including courses in religious instruction in the curriculum.

33. As I have previously mentioned, religious education is a regular part of the curriculum in the schools under my supervision. Parents who enroll their children in those schools, whether those parents are Catholics or members of some other religious faith, are told prior to enrollment that their children must participate in the entire curriculum of the schools, including that portion of the school day devoted to religious instruction.

34. In the *Nyquist* and *Levitt* decisions, the Supreme Court included as one element of the "profile" of parochial

schools that they required students to "attend instruction in the theology and doctrine of a particular faith." While all students in the schools under my supervision are required to attend religious instruction, the content of that instruction is not as narrow or as limited as the Supreme Court suggested in those two decisions.

35. The focus of religious instruction offered in the schools of Brooklyn Diocese is on the teachings of Christianity as the Roman Catholic Church understands those teachings. In the course of that instruction, teachings and beliefs that are peculiar to the Roman Catholic Church are examined and explained. Those who teach religious education classes are required to have a thorough understanding of those teachings and beliefs and are required to teach them accurately, not representing as Catholic doctrine something which is not.

36. However, the religious instruction offered in the schools of the Brooklyn Diocese is not limited or restricted to Catholic teaching or doctrine. The Roman Catholic Church is part of a broader Christian community, and many of its teachings and beliefs are shared by other religious denominations. Of necessity, therefore, much of what is taught in religious instruction is not narrowly sectarian in content. Moreover, our schools are conscious of the mandate from the Second Vatican Council to have respect for other Christian communities and to "joyfully acknowledge and esteem the truly Christian endowments from our common heritage" with other Christian churches. In the spirit of that mandate, the religious instruction offered in the schools in the Brooklyn Diocese, and particularly those schools with Title I programs and non-Catholics in the student body, shows respect and sensitivity for the religious beliefs of all students, whatever those beliefs may be.

37. No effort is made in the religious instruction offered by the schools of the Brooklyn Diocese to compel any student, whether he is Catholic or of some other religious faith, to accept as valid or adhere to the teachings

of the Roman Catholic Church. Indeed, any effort to do so would be in direct conflict with Roman Catholic teachings. One of those teachings is that faith is considered to be a gift of God to which each person must respond freely or not at all. It would be contrary to those teachings to attempt to compel any student to adhere to particular religious beliefs or to accept a faith to which he cannot freely subscribe. Thus, the schools under my supervision do not "require obedience by students to the doctrines and dogmas" of the Roman Catholic Church, as the Supreme Court suggested the parochial schools did in the *Nyquist* and *Levitt* cases.

38. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools of the Brooklyn Diocese for a variety of reasons. One of their motivations is that they themselves are strongly religious people—whether they be Baptists or Muslims or Buddhists—and they wish their children to be exposed to religious values as a part of their education. But they enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children. The schools of the Brooklyn Diocese would be defeating the expectations of those parents if they used the religious instruction or any other parts of the curriculum for purposes of proselytization or to compel the students to accept beliefs that they cannot in good conscience accept. Those schools would also be contradicting the ecumenical teachings of the Second Vatican Council and denigrating the social mission of the Roman Catholic Church in maintaining the schools in the inner city that are attended by a significant number of non-Catholics.

Religious Activities

39. Most of the elementary and secondary schools of the Brooklyn Diocese include some form of religious ob-

servance as part of the school day. More typically, that religious observance would be in the form of a prayer recited at the beginning or end of the school day, or before instruction begins in a particular class. In addition, many schools will schedule on an occasional basis and during regular school hours more formal liturgical observances. All students enrolled in those schools are expected to be present during those religious observances, but the degree or extent to which they participate is a matter of their own consciences. There are, however, some religious activities in the schools, such as the reception of the Sacraments, in which non-Catholic students are not permitted to participate.

40. One of the characteristics of the parochial schools described in the *Nyquist* and *Levitt* decisions was that they required "attendance of pupils at religious activities." The schools in the Brooklyn Diocese engage in that activity to the extent that I have described.

41. Parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registering their children that the children will be expected to be present for the type of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that his child's participation in those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

42. I have attempted in this affidavit to provide an accurate portrayal of the policies and practices of the elementary and secondary schools of the Brooklyn Diocese. I am aware that my description of the policies and practices of those schools is at odds with the description of parochial schools in the *Nyquist* and *Levitt* decisions and with many popular stereotypes of Catholic parochial

schools. However, those stereotypes reflect a profound misconception of the purposes and educational programs of the schools under my supervision.

43. Those stereotypes seek to portray Catholic parochial schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or of compelling them to subscribe to the beliefs of the Roman Catholic Church. While the schools of the Brooklyn Diocese do serve religious functions and do have religious objectives, they do not have the extreme characteristics that the stereotypes attribute to them.

44. The basic objective of the elementary and secondary schools in the Brooklyn Diocese, including those with Title I programs, is to provide their students with a sound education in an environment in which they are exposed to religious education and religious and moral values. Our goal is to produce students who have the knowledge and intellectual skills to be useful and productive members of their communities and who are also aware of the religious dimension of man.

/s/ Vincent D. Breen
REVEREND VINCENT D. BREEN

Subscribed and sworn to before me
this 22nd day of March, 1979.

/s/ Catherine B. Dumphy
CATHERINE B. DUMPHY
Notary Public, State of New York
No. 41-4506593
Qualified in Queens County
Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 CV 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

MEMORANDUM ORDER

This case presents another chapter in the ongoing saga concerning the constitutionality of provisions of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.* *See Flast* v. *Cohen*, 392 U.S. 83 (1968). Plaintiff taxpayers seek declaratory and injunctive relief upon the ground that Title I violates the Establishment Clause of the First Amendment to the United States Constitution. The case is before the Court upon cross-motions for summary judgment.

The case was stayed pending the final outcome of *National Coalition for Public Education and Religious Liberty* v. *Harris* (*PEARL II*), 489 F.Supp. 1248 (S.D. N.Y. 1980) (three-judge court), *appeal dismissed*, 449 U.S. 808 (1980). By stipulation of the parties, this case is to be determined upon the trial and record in *PEARL*

II.[1] Thus, the Court has before it the exact same facts and evidence which persuaded the three-judge District Court in *PEARL II* to find Title I constitutional upon the basis of the record before it.

This Court has considered the thorough and lengthy unanimous decision of Judge Tenney in *PEARL II* and is of the opinion that it reaches the correct result for the reasons stated therein. Plaintiffs rely heavily upon language in *Meek* v. *Pittenger*, 421 U.S. 349, 367-73 (1975); however, they do not respond to Judge Tenney's numerous and accurate observations about the factual distinctions between the two cases. Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program in New York City's schools was not before the courts in *Meek*. As a result, the conclusions reached therein were reasonable inferences drawn from the circumstances.

In the case at bar, however, although arguably some of the circumstances of the Title I program parallel the State program in *Meek*, the direct evidence demonstrates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional governmental activity inherent in the arrangements of this program. Therefore, the Court finds that defendants have sustained their burden of demonstrating that Title I, as administered in the nonpublic schools of New York City, does not offend the Establishment Clause of the

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[1] Plaintiffs' memorandum in support of their motion adopts the *PEARL II* court's statement of facts as its own; therefore, there apears to be no dispute about the accuracy of the *PEARL II* court's findings.

First Amendment. Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

SO ORDERED.

The Clerk of Court is directed to enter judgment in favor of defendants dismissing the complaint. The Clerk is further directed to forward copies of this Memorandum Order to counsel for the parties.

/s/ Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
October 4, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 78-1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

JUDGMENT

[Filed Oct. 20, 1983]

A memorandum order of Honorable Edward R. Neaher, United States District Judge, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment, and directing the Clerk of Court to enter judgment in favor of defendants dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants; that the defendants' motion for summary judgment is granted; that the plaintiffs' motion for summary judgment is denied; and that judgment is entered in favor of defendants dismissing the complaint.

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
October 17, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 CV 1750 (ERN)

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, PLAINTIFFS

—against—

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, DEFENDANTS

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, INTERVENOR-DEFENDANTS

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the plaintiffs in this action hereby appeal to the United States Court of Appeals for the Second Circuit from the memorandum order of the United States District Court for the Eastern District of New York, filed on October 13, 1983, and from the judgment entered on such order by the Clerk of the Court and filed on October 20, 1983 denying plaintiffs' motion for summary judgment, granting defendants' and intervenor-defendants' cross-motion for summary judgment, and dismissing the complaint in the action, and plaintiffs hereby appeal from each and every part of such order and judgment.

Dated: December 1, 1983

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-6359

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON, APPELLANTS

v.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLEES

and

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS, APPELLANT-INTERVENORS

On Appeal from the United States District Court
for the Eastern District of New York

[Filed August 2, 1984]

NOTICE OF APPEAL

PLEASE TAKE NOTICE that appellee-intervenors Yolanda Aguilar, Lillian Colon, Miriam Martinez and Belinda Williams appeal the Judgment of this Court in this case to the United States Supreme Court pursuant to 28 U.S.C. § 1252.

Appellee-intervenors Yolanda Aguilar, *et al.*, note that the decision of this Court in this case provides that an appeal of its decision to the Supreme Court shall operate

to stay the mandate of this Court until the final disposition of the appeal by the United States Supreme Court. Slip Op. at 5108.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 2nd day of August, 1984, served a copy of this "Notice of Appeal," by first-class mail, postage prepaid, upon the following:

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SUPREME COURT OF THE UNITED STATES

No. 84-237

YOLANDA AGUILAR, ET AL., APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

Appeal from the United States Court of Appeals
for the Second Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is consolidated with case No. 84-238, *Secretary, United States Department of Education* v. *Betty-Louise Felton, et al.* and case No. 84-239, *Chancellor of the Board of Education of City of New York* v. *Betty-Louise Felton, et al.*, and a total of one hour is allotted for oral argument.

October 9, 1984

SUPREME COURT OF THE UNITED STATES

No. 84-238

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

Appeal from the United States Court of Appeals for the Second Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is consolidated with case No. 84-237, *Yolanda Aguilar, et al.* v. *Betty-Louise Felton, et al.* and case No. 84-239, *Chancellor of the Board of Education of City of New York* v. *Betty-Louise Felton, et al.*, and a total of one hour is allotted for oral argument.

October 9, 1984

SUPREME COURT OF THE UNITED STATES

No. 84-239

CHANCELLOR OF THE BOARD OF EDUCATION OF CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

Appeal from the United States Court of Appeals for the Second Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. This case is consolidated with case No. 84-237, *Yolanda Aguilar, et al.* v. *Betty-Louise Felton, et al.* and case No. 84-238, *Secretary, United States Department of Education* v. *Betty-Louise Felton, et al.*, and a total of one hour is allotted for oral argument.

October 9, 1984

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Nos. 84-237, 84-238, and 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellants,

and YOLANDA AGUILAR, and LILLIAN COCON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Appellants-Intervenors,

vs.

BETTY LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELLON,

Appellees.

On appeal from the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF PARENTS RIGHTS, INC., AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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Nos. 84-237, 84-238, and 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellants,

and YOLANDA AGUILAR, and LILLIAN COCON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Appellants-Intervenors,

vs.

BETTY LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELLON,

Appellees.

On appeal from the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF PARENTS RIGHTS, INC., AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

Parents Rights, Inc. respectfully moves for leave to file the accompanying brief as amicus curiae in support of Appellants. Written consent of Counsel for the parties has been requested but has not been received.

Parents Rights is a national organization consisting of over 20,000 parents and other individuals residing in all fifty states who seek to support and promote freedom of choice and paren-

tal rights in education. The group's stated purposes are "to secure legal recognition for the right of parents to direct and control the education of their children; to secure true freedom of choice for parents in the education of their children; to undertake and support court action to achieve their goals; to publish literature and other materials to awaken the public to the denial of the human rights of the family in education."

Members of Parents Rights are concerned with supporting the natural and constitutional "right coupled with the high duty" of parents to "direct the upbringing and education of children under their control," with due deference to the interest of the state in this important field. In this connection they are also concerned with the implications of this parental right and obligation for governmental encouragement, support, and regulation of education.

Members of Parents Rights, Inc., are concerned about the present case because it ultimately threatens the right and ability of parents to direct the education of their children. The case challenges the rights of parents and their children to share comparably and equitably in the benefits of general federal legislation promoting education if they attend schools other than governmental schools. A contrary decision would not only deprive such children of needed educational benefits, but would also be another pressure on parents to abandon their right to send their children to schools they consider best for them.

BRIEF AMICUS CURIAE FOR PARENTS RIGHTS, INC.

INTEREST OF AMICI

The interest of the amici in the instant litigation is set forth in the accompanying motion to file this brief.

PREFACE

Gratitude is expressed to Professor Emeritus Daniel D. McGarry and Robert J. Wittmann, as well as to the Thomas J. White Foundation for help with this brief.

SUMMARY OF ARGUMENT

The limited contacts of government with church-related schools in the New York application of Title I of the Elementary and Secondary Education Act do not constitute excessive entanglement of government and religion. Excessive political entanglement is absent because of a broad class of beneficiaries and the absence of financial subsidization. Excessive administrative entanglement is absent because of the features and circumstances of the program, as well as because of the educational rights of parents and students being protected and the advanced degree of socialization of education.

The purpose of the prohibition against excessive administrative entanglement, as explained by this Court, is to protect religion against governmental interference and inhibition. Opponents maintain that on-premises instruction of students in non-public schools by public employees is unconstitutional because government must either run a serious risk of having public employees inculcate religion in church-related schools, or exercise extreme surveillance over church-related schools to avoid this possibility. Either alternative would be unconstitutional, as the first would seriously risk an establishment of religion, and the second would seriously threaten free exercise of religion, according to opponents.

The features and circumstances of the New York application of Title I as well as common sense and experience show that neither is there any serious likelihood of substantial effective inculcation of religion by public employees of various persuasions rendering remedial services in private schools, nor is extreme surveillance of the schools or their employees present or required. The existing supervision, which is sufficient, is of public school employees by public school employees, and is no more nor less that that which should be required to prevent inculcation of religion in public schools. Contacts between public school employees and private school employees are minimal; and the contacts of government with the church-related institutions are no more than many already existent necessary contacts of government with such institutions.

The constitutional rights of parents and children require that considerable contacts between government and church-related schools and their users be allowed. Many personal rights are implemented by voluntary private institutions, including church-related ones. Disallowing general benefits because of the exercise of such rights, especially when such benefits have been legislated by Congress, would penalize the exercise of constitutional rights without a substantial and compelling reason.

The increasing socialization of our elementary and secondary education, according to the principle "From each according to his means; to each according to his needs," also requires allowance of considerable contacts between government and private educational institutions, such as church-related schools, if personal freedoms are to survive.

ARGUMENT

I. The involvement of government with religion in the application of Title I of the Federal Elementary and Secondary Education Act of 1965 (20 U.S.C. §2701 *et seq.*), by the New York City Board of Education does not result in excessive entanglement between government and religion in view of its features and circumstances.

A. Only "excessive entanglement"—not all contact and relationship between government and religion—is forbidden by the Religion Clauses of the First Amendment.

The excessive entanglement test for the constitutionality of relationships between government and religion was clearly enunciated and explained by this Court in *Walz v. Tax Commission,* 397 U.S. 664 (1970) at 668-669 and 674, and in *Earley v. Di Censo,* and its companion case *Lemon v. Kurtzman,* 403 U.S. 602 (1973) at 612-613 and 616-620. The test has been applied in these and other cases, such as *Meek v. Pittenger,* 95 S.Ct. 1753 (1975) at 1764-1767 without substantial elaboration of its basic principles and assumptions.

In stating the excessive entanglement test, this Court said, "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." The Court then went on to add: "The test is inescapably one of degree." *Lemon v. Kurtzman,* as cited, at 674.

The statement of the excessive entanglement test in both *Walz* and *Lemon* was prefaced by an explanation of the First Amendment purposes it was meant to defend. With reference to the purpose of the Establishment Clause of the First Amendment and this test, the Court in *Walz v. Tax Commission* said that "for the men who wrote the Religion Clause of the First Amendment, the 'establishment of a religion' connoted sponsorship, financial support, and actual involvement of the sovereign in religious activity." *Walz v. Tax Commission,* as cited, at 668.

Consistently with this, this Court in *Lemon v. Kutzman* listed as the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " (Citation omitted.) *Lemon v. Kurtzman,* as cited, at 612.

With reference to the general principle guiding application of the Religion Clauses and its corollary excessive entanglement test this Court said: "The general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion." The Court then added: "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality." *Walz v. Tax Commission,* 397 U.S. 664 (1970) at 669.

Applying this to the excessive entanglement test, this Court has said: "Each value judgment under the Religion Clauses must, therefore, turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices, or have the effect of doing so. Adherence to the policy of neutrality that derives from an accomodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Walz v. Tax Commission,* as cited at 669-670.

The foregoing statements of the purpose of avoiding excessive entanglement of government with religion emphasizes protection of the religious freedom of citizens and their churches, and relate mainly to avoidance of what has come to be called administrative entanglement (see below). This was further expanded in *Lemon* to include avoidance of political entanglement, which emphasizes protection of the body politic or state against excessive intrusion of religion and churches into political processes. The latter seeks to avoid serious political division along religious lines. *Lemon v. Kurtzman,* as cited, at 622-624.

Since this particular form of excessive entanglement does not seem to be especially at issue in the present case, our principal attention is focused on general and administrative entanglement.

The purposes of non-entanglement as explained by this Court are mentioned here inasmuch as they can easily be lost sight of so that the test is misapplied. According to the Court's explanation, the main purpose of avoiding excessive general and administrative entanglement is to protect religion and churches, while that of avoiding excessive political entanglement is to protect the state. (See above.)

In explaining the excessive entanglement doctrine, this Court has made clear that not all contact and involvement of government with religion is prohibited—only *excessive entanglement.* Thus in *Walz* the Court, quoting Mr. Justice Douglas writing for the Court in *Zorach,* said: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.' *Id. (Zorach v. Clauson,* 343 U.S. 306 (1952)) at 312." *Walz v. Tax Commission,* as cited at 669. After saying that, "we will not tolerate either governmentally established religion or governmental interference with religion," the Court as previously mentioned, added: "Short of these expressly proscribed governmental acts, there is room of play in the joints productive of a benevolent neutrality...." *Walz v. Tax Commission,* as cited at 669. Regarding the excessive entanglement test itself, the Court admonishes us that, "The test is inescapably one of degree."

This Court has also explained that the degree of general or administrative involvement of government with religion that would be excessive would be one, "that would tip the balance toward government control of churches or governmental restraint on religious practice." *Walz v. Tax Commission,* as cited, at 669-670. Such excessive involvement has also been described by this Court as "intrusion" or as extreme, unwarranted, and resented entry of either church or state "into the

precincts [or affairs] of the other." *Lemon v. Kurtzman* as cited, at 614; *Lynch v. Donnelly,* 104 S.Ct. 1355 (1984) at 1358.

It may be seen from the foregoing that the principle confusion which may arise in applying the excessive general or administrative entanglement test is to conceive of it as a protection against an establishment of religion. According to the explanations of this Court discussed above, the purpose of the general or administrative entanglement test is to protect religion and churches from excessive government interference; while that of the political non-entanglement test is to protect the body politic from extreme division over religious issues. Accordingly, the principle of non-entanglement does not include protection against establishment of religion, which is presumably to be left to the purpose and primary effect tests, which are better adapted to accomplishing this in a just and equitable manner.

Based on discussions of this Court, excessive entanglement is usually divided into two kinds; administrative and political. *Lemon v. Kurtzman,* as cited, at 614-620 and 622-623; *Roemer v. Board of Public Works,* 426 U.S. 736 (1976) at 748-750; Jesse H. Choper, "The Religion Clauses of the First Amendment" in 41 *University of Pittsburgh Law Review,* 673 (1980) at 678-685; Kenneth F. Ripple, "The Entanglement Test of the Religion Clauses..." in 27 *U.C.L.A. Law Review,* 1195, (1980) 1195-1208. Since the absence of excessive general or administrative entanglement in the New York application of Title I is the main concern of this brief, we will first briefly discuss the absence of excessive political entanglement.

B. Excessive political entanglement between government and religion is not engendered by the New York application of Title I.

According to this Court, excessive political entanglement is that degree of involvement of religion and politics which threatens to bring about undesirable political division among citizens along religious lines. Also, according to the Court, such

extreme division may arise when there is a question of providing governmental financial assistance for church-related education. Further, according to the Court, such division was one of the evils which the First Amendment sought to obviate. *Lemon v. Kurtzman,* as cited at 622-623.

Such excessive political entanglement and extreme divisive political potential is absent in the present application of Title I because of the broad class of beneficiaries that includes disadvantaged public school students as well as disadvantaged private school students, and benefits many more (over seven times) of the former than of the latter. *Felton v. Secretary, United States Department of Education,* 739 F.2d 48 (1984) at 51. Rather than being a cause of division, the inclusion of private school students has been a factor for unity and was actually one of the features that promoted general acceptance and passage of the original legislation.

As a result of the broadness of the legislation, there has been no evidence of its resulting in political division for religious reasons in the several years since its original passage in 1965. Political division is also avoided because the federal entitlement program does not come up for annual renewal—one of the disrupting difficulties of the legislation at bar in *Lemon-Earley. Lemon v. Kurtzman,* as cited, at 623-624.

A further factor favoring political peace concerning Title I and its application in the City of New York is the fact that the federal subsidization is directed to a public school district and its employees, and it does not involve any direct subsidization of private and church-related schools and/or teachers. Furthermore, the services are also rendered to and directly benefit the disadvantaged children themselves rather than the schools.

Finally, this Court has twice declared that a serious danger of excessive political entanglement in such cases arises only in the event of direct financial payments or reimbursements to church-related schools or their teachers: this limitation was mentioned in *Mueller v. Allen,* 103 S. Ct. 3062 (1983) at 3071, n. 11, and

was repeated and confirmed in *Lynch v. Donnelly,* 104 S.Ct. 1355 (1984) at 1364-1365.

C. Several important features and circumstances contribute to prevent excessive administrative entanglement of government with religion in the application of Title I of the Elementary and Secondary Education Act in New York City.

Opponents of New York's application of Title I of the Federal Elementary and Secondary Education Act argue that it results in a dilemma for government, either response to which would be unconstitutional. On the one hand, if the government does not provide for "comprehensive, discriminating, and continuing surveillance and controls," it runs a serious risk of subsidizing an impermissible fostering of religion. On the other hand, if the government does provide such extreme surveillance and controls it becomes engaged in excessive entanglement with religion which seriously threatens the independence and freedom of religion. Either course, according to the argument would violate the Religion Clauses of the First Amendment.

It should first be observed, as has been noted above, that "excessive involvement" is relative: "a matter of degree," *Walz v. Commission,* as cited at 674; *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426. Dependent on all the circumstances, this relativity and allowable degree is also in relation to the various factors, such as personal rights and public interests involved. With specific reference to entanglement, this Court has noted that, "the line of separation" is a "variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman,* as cited, at 614. With regard to "on premises" instruction by public teachers, the Court, implying consitutionality at least under certain conditions, has noted that, "The First Amendment implications may vary according to the precise contours of the plan formulated." *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426. This Court has also said: "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved a difficult

one . . . Usually it requires a careful evaluation of the facts of the particular case . . . . A federal court does not sit to render a decision on hypothetical facts . . . ." *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426-427 (citations omitted).

Emphasizing the extreme nature of the degree of general and administrative entanglement between government and religion that would make relations between them suspect of being unconstitutional, this Court has said that it would be, "that kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice." *Walz v. Tax Commission,* as cited, at 669-670.

We will show that neither "horn" or alternative of the dilemma mentioned above—impermissible fostering of religion or its inhibition by extreme surveillance—is fulfilled, necessitated, or gravely threatened.

1. The involvement of government and religion in the New York application of Title I does not incur a serious risk of an impermissible fostering of religion. In order to be constitutionally disabling, fears must be reasonable and well grounded and risks must be grave and real. Exaggerated fears and minimal risks or mere possibilities are not enough. As this Court has said, "the measure of constitutional adjudication is the ability to distinguish between real threat and mere shadow." *Marsh v. Chambers,* 103 S. Ct. 3330 (1983) at 3337. This Court has also said: "A possibility always exists, of course, that the legislative objectives of any law or legislative program may be subverted by conscious design or lax enforcement...but judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton v. Richardson,* 403 U.S. 672 (1971) at 679 (plurality opinion).

According to the unanimous decision of the three-judge District Court in *National Coalition for Public Education and Religious Liberty v. Harris,* 489 F.Supp. 1248 (1980), the church-related schools involved in the New York program are not pervasively sectarian in the way and to the degree attributed

to the Rhode Island schools in *Lemon v. Kurtzman - Earley v. DiCenso,* (as cited, at 615-618); the equipment and material provided are used and controlled solely by the public school personnel; all religous symbols are removed from the classrooms; the financial assistance provided by the federal government goes directly to the public board of education and its employees for instruction and services for disadvantaged students; no financial subsidy is provided for the private schools or their personnel; the only supervision and surveillance involved or necessary is of public school employees by public school personnel; actual contacts between public school personnel and private school personnel are limited, minimal, and routine; and the program in the past 14-17 years has not engendered any impermissible inculcation of religion at public expense or any excessive entanglement between state and church.

National Coalition for Public Education and Religious Liberty v. Harris, 489 F.Supp. 1248 (1980), appeal dismissed for want of jurisdiction *sub nom. National Coalition for Public Education and Religious Liberty v. Hufstedler,* 449 U.S. 808 (1980): 489 F. Supp. 1248 (1980) at 1262-1264 and 1267-169. Evidence in the case thus demonstrates the absence of serious potential for excessive entanglement and impermissible fostering of religion by public school personnel entering private church-related schools is further shown by the following:

The change in the character of church-related schools themselves in recent years (apart from the ingress of public school teachers in the application of Title I) is illustrated by the fact that nationwide, whereas in 1960 the proportion of religious teachers (nuns, brothers, and priests) to lay teachers was about 2 to 1, by 1982 it was 1 to 2. *Statistical Abstract of the United States: 1984* (U.S. Bureau of the Census, 104th ed., 1983) at 156.

This is but one aspect of the reduction of the supposed "pervasively religious atmosphere" penetrating every subject in these schools when taught by their own regular teachers.

The nature of the public teachers employed and professionals coming into church-related schools for remedial work in the application of Title I make it highly unlikely that they will seek to inculcate the religion of the school, or maintain a "pervasively religious atmosphere in their classes. About three-fourths (73.5%) of the public teachers coming into the private schools in the New York application of Title I are of faiths different from that of the schools in which they are teaching; and about three-forths (78%) of them are also itinerant. *Felton v. Secretary,* as cited, 739 F 2d 48 (1984) at 53 and J.A. 44-45. The public teachers and professionals have been given detailed instructions calculated to prevent them from injecting any religion into their teaching and services. They are also regularly supervised by public school supervisors to see that they are observing these restrictions. (JA 45-51); *Felton v. Secretary,* as cited, at 53; and *National Coalition for P.E.A.R.L. v. Harris,* as cited, at 1267-1269. Evidence shows that the regulations have been strictly observed and no known violations on the part of the public employees have occurred in the several years of the existence of the program. *National Coalition for P.E.A.R.L. v. Harris,* as cited, at 1267-1268. *Felton v. Secretary,* as cited, at 53-54.

It is difficult to see how and why public teachers would violate their instructions and commitments to try to inculcate the religion of the sponsoring bodies of the schools wherein they teach when they would be needlessly violating these instructions and commitments, be risking their position and professional standing with the School Board, be injecting religion in an illogical, incongruous, and even ridiculous manner into unrelated subjects and services, and would in most cases be inculcating religious views other than their own or religious doctrines concerning which they had insufficient knowledge.

The situation with regard to the teachers applying Title I in New York is in marked contrast to the original situation with regard to the religious teachers in the Rhode Island schools, which apparently prompted the excessive entanglement doctrine

in *Earley v. DiCenso - Lemon v. Kurtzman,* as cited above, which situation was projected into subsequent cases such as *Meek v. Pittenger,* also above cited. 95 S.Ct. 1753 (1975). In *Earley - Lemon* "approximately two-thirds" of the teachers in the church-schools were "nuns of various religious orders" *Lemon v. Kurtzman,* as cited, at 615. The teachers therein were teaching a variety of secular subjects, some of which could possibly lend themselves to supporting a certain religious viewpoint. The preponderance of nuns in the Rhode Island schools enhanced the "religious atmosphere" of the latter according to the Court. *Id.*, at 615-617. It was apparently mainly of such teachers that the Court surmised that "a dedicated religious person, teaching in a school affiliated with his or her faith, and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618.

The subject matter taught and services rendered by public school personnel do not really lend themselves to the inculcation of religion — at least to its effective inculcation. No one has never shown how such subjects as remedial reading, remedial English, and remedial mathematics can be made fertile fields for effective religious inculcation or how they can participate in religious pervasion. Common sense and the ordinary experience of both students and teachers dictate and testify otherwise. It would be illogical, incongruous, ridiculous, and almost certainly unproductive—even counterproductive—for public employees to drag religion into purely secular remedial courses and services.

The terms "religious atmosphere" and "pervasively religious instruction" have often been applied to church-related schools in a somewhat *a priori* manner. But the supposed "religious atmosphere" of church-related schools and its degree and implications are often assumed or exaggerated. Public school teachers and other professionals in the New York application of Title I testified that they did not perceive "a dominant sectarian mission" in the church-related schools wherein they taught. *National Coalition for P.E.A.R.L. v. Harris,* as cited, at 1263.

Allegations of a "predominant" or "pervasive religious atmosphere" are based mainly on two things: the asserted sole or main purpose for the foundation and maintenance of the church-related schools, and the preponderance of dedicated religious persons in the schools. *Lemon v. Kurtzman,* as cited at 615-616; and *Meek v. Pittenger,* as cited, at 1758-1759 and 1764-1765. Mention is also made of such things as the presence of religious symbols and frequent proximity of a church or chapel, although the influence of the latter would seem to be comparatively minor.

As has been seen, the "religious atmosphere" of church-related schools as far as the preponderance of religious persons (nuns, brothers, and priests) is concerned has radically declined in the last two decades. Today the situation is reversed, with a preponderance of lay persons and the trend seemingly continuing. *Digest of Education Statistics, 1983-4* as above cited, at 156.

As far as the predominant purpose of the foundation and maintenance of church-related schools is concerned, it is safe to say that in colonial times, when such schools were the main and practically exclusive educational institutions on all levels, they were founded as much (perhaps even more) for secular as for religious education.

It has been alleged repeatedly that church-related schools are so pervasively religious with such a dominant "religious mission" in them that secular and religious instruction are "inextricably intertwined" because "the religious mission" is the only reason for the church-related school to exist. See, v.g. *Meek v. Pittenger,* as cited, at 1758-1759 and 1764-1765. Besides the fact that this is an exaggeration, a characterization of the essential and pervasive nature of these schools based on a partial motive for their founding confuses a leading motive of their founders with the full nature of their product. Many Christians seek to follow the injunction of St. Paul: "Whether you eat or drink or whatsoever else you do, do all for the glory of God." I

Cor., 10:31. But a religious motive or intention does not change the essential nature of their acts such as eating and drinking from being physical and secular to being essentially religious. If it did, the provision of social security payments to them for such purposes might be unconstitutional. Despite such motives and intentions, by far the principal activity of church-related schools is provision of secular instruction in secular subjects, even though they have been founded and may be maintained partly or mainly to insure the inclusion of adequate religious instruction in the education of children.

2. The surveillance or supervision maintained and required over public school personnel providing remedial instruction and services in church-related schools in the application of Title I in New York does not result in excessive entanglement of government and religion.

The existing supervision of public school personnel providing remedial instruction and services in church-related schools is not intense and does not result in excessive entanglement of government with religion. It is not that kind of excessive involvement "that would tip the balance toward government control of churches or governmental restraint on religious practives." *Walz v. Tax Commission,* as cited, at 669-670. The surveillance or supervision is limited to supervision of public school employees by public school employees, and does not extend to the church-related schools themselves or to their employees and instruction. There is no substantial relationship developed between government and religion. No further surveillance is required because of the unlikelihood of the public school employees engaging in religious instruction under the circumstances. There is actually less likelihood of public school employees communicating to their students in nonpublic schools their own religious convictions as to the general meaning of life and the best life than of their doing so in public schools where there are practically no precautions against this or monitoring in this respect. Whereas these same employees have very little supervision of their teaching in public schools insofar as such content is concerned,

in the church-related schools they have both instructions and supervision to avoid any inculcation of a religion or an outlook on and program for life. Excessive surveillance imperilling religious freedom is not required by the New York program because of the very remote possibility of unconstitutional inculcation of religion through it, and, even if it were to be required in whatever degree, such surveillance would not affect the teaching of religion in the church-related schools. Neither would it adversely affect the freedom of religion in the school or substantially diminish the latter's independence of government.

II. The right of parents to direct the education of their children allows and requires considerable contacts and involvement between government and church-related schools.

A. Parents have a right to direct the education of their children including use of church-related schools of their choice.

1. Parents have a constitutional right to direct the education of their children in schools of their choice.

This Court has several times affirmed the constitutional right of parents to direct the education of their children and protected and promoted the implementation of this right, as in *Meyer v. Nebraska,* 262 U.S. 390 (1923) at 400-402; *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) at 534-535; *Everson v. Board of Education,* 330 U.S. 1 (1947) at 18; *Griswold v. Connecticut,* 371 U.S. 479 (1965), at 510; *Minersville v. Gobitis,* 310 U.S. 586 (1940); *Prince v. Massachusetts,* 321 U.S. 158 (1944) at 166; and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) at 213-214.

In *Meyer v. Nebraska,* 262 U.S. 390 (1923) this Court upheld the natural and constitutional right of parents to determine and include courses of instruction, including the German language (at the time in disrepute), best calculated to prepare their children for their future life: The Court said:

"Corresponding to the right of control, it is the natural duty of the parent to give his children educaiton suitable to their sta-

tion in life....That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally is clear, but the individual has certain fundamental rights which must be respected." *Meyer v. Nebraska,* as cited, at 400-401. The Court went on to say: "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." *Id* at 402.

What has come to be a classic statement of the right of parents to direct the education of their children was made by this Court in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), in which the Court first reaffirmed the broad principle laid down in *Meyer (supra):*

"As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* as cited, at 534-535.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), Justice Douglas, writing for the Court reaffirmed the right of parents to direct the education of their children and associated it with the general rights of freedom of communication and information, also affirmed by the First Amendment, as well as with rights

prescribed by the Fourteenth Amendment: "By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* as cited, at 482.

In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court went so far as to approve the excusal of Amish parents and their children from the obligation of compulsory education laws with regard to academic secondary education, upholding parental rights regarding, "the religious upbringing of their children" in order to "prepare (them) for additional obligations." *Wisconsin v. Yoder,* as cited, at 214.

The primary right of parents to direct the education of their children is also, incidentally, affirmed by the *Universal Declaration of Human Rights* of the United Nations, to which the United States is a signatory. Article 26, Section 3 of this *Declaration* says: "Parents have a prior right to choose the kind of education that shall be given to their children." United Nations, *Universal Declaration of Human Rights* (Reprint, 1981)

2. The right of parents to educate thier children in schools of their choice includes the right to have them educated in church-related schools that include religion along with secular subjects.

Originally most of the schools in this country were church-related schools which included religion along with secular subjects. These schools were supported by public subsidies as well as by private donations and fees paid by parents. Brickman, *Historical Background*. . . 1 Educational Freedom, ed. McGarry and Ward (1966), 6-8.

For some time, following the advent of public education as we know it, public schools continued to inculcate a general form of Protestant Christianity. But eventually the increasingly

heterogeneous nature of our communities has caused religious education to be excluded from public schools. *Id.*, 11-17.

Since the advent of free public education, many parents have continued to send their children to private church-related schools because of the features of the secular education provided in them as well as in order to provide their children with an adequate and effective religious education. This is still the dual purpose of the majority of nonpublic schools in the United States: to provide sound secular instruction accompanied by religion instruction.

In upholding the right of parents to direct the education of their children in several cases, this Court has incidentally upheld their right to educate them in church-related schools. This it has done both by not restricting the parental right in education, and also by favorably deciding cases involving church-related education and religious-oriented education, as in *Pierce v. Society of Sisters,* as cited above; *Prince v. Massachesetts,* as cited above; and *Wisconsin v. Yoder,* as cited above. In such cases, the Court has specifically referred to the right of parents to provide their children with a general education that includes religious along with secular education.

In *Prince v. Massachesetts,* 321 U.S. 158 (1944), the Court said:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* as cited, at 166.

3. The natural and constitutional right of parents to direct the education of their children is further supported by the First Amendment rights of free exercise of religion and freedom of communication and information.

a) This right is supported by the right of free exercise of religion.

To recognize the parental right to direct the education of their children in schools of their choice, but to deny them the right to send them to church-related schools which include religion in their curriculum along with secular subjects would be contrary to the First Amendment's prohibition against governmental inhibition of "the free exercise of religion" as extended to the states by the Fourteenth Amendment, according to *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

This Court in *Abington School District v. Schempp,* 274 U.S. 203 (1963), in speaking of the "wholesome neutrality" demanded of government by the Religion Clauses after referring to the Establishment Clause, says of the Free Exercise Clause, as applied to education:

> And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. *Abington School District v. Schempp,* as cited, at 223.

This Court also stressed governmental neutrality regarding religion and the teaching of religion in *Epperson v. Arkansas,* 393 U.S. 97 (1968) at 103.

It is obvious that freedom of parents to transmit their religion adequately to their children by general education that includes religion, as well as the right of their children to receive this education is an integral part of their constitutional right to a "free exercise of religion."

b) The right of parents to educate their children in church-related schools is further supported by the freedom of communication and information required by the First Amendment.

That the freedom of communication and information required by the First Amendment apply to education and its con-

tent, including religion, is confirmed by this Court in various cases.

As noted above, Justice Douglas, writing for the Court in *Griswold v. Connecticut,* above cited, noted that the general rights of freedom of communication and information affirmed by the First Amendment were associated with the right of parents to direct the education of their children, and concluded: "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* as cited, at 482.

This right of academic freedom is also forcibly proclaimed by this Court in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), wherein the Court says:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " (Citation omitted). *Keyishian v. Board of Regents,* 383 U.S. 589 (1967) at 603.

In *Board of Education v. Barnette,* 319 U.S. 624 (1942), this Court insisted on the same principle, saying: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *Board of Education v. Barnette,* as cited, at 641.

This right of choice "in politics, nationalism, religion, or other matters of opinion," with its associated right of choice of education, is left to individuals, and in the case of children it is rendered on their behalf by their parents.

4. The constitutional right of parents to direct the education of their children and have it include religion along with secular subjects is accompanied by a right of their children to receive this education.

In our society parents have a right to direct the education of their children and provide them with a general education that includes religion along with secular subjects. Most of the rights of minor children in our society are protected, asserted, and implemented for them by their parents. Among these rights of children is a right to receive an education that includes religion as well as secular subjects, if such is chosen by their parents. This right is ultimately based on the same foundations as the educational right of their parents.

B. The constitutional rights of parents and their children regarding education require allowance of considerable contacts and involvement between government and church-related schools, especially when participation in general educational benefits is legislated by Congress.

1. Congress has legislated, with this Court's approval, that children in non-governmental schools, including church-related schools, should share comparably with public school children in the educational benefits of the federal Elementary and Secondary Education Act.

In the Elementary and Secondary Education Act of 1965, as amended, Title I, 20 U.S.C. §2701 *et seq.* (1982) and the related Education and Consolidation Act of 1981, Chapter I, 20 U.S.C. §3801 *et seq.* (1982), Congress has legislated that children enrolled in private schools shall share equitably with children in public schools in the educational services provided by the Act, taking into account the number of disadvantaged students from low income families to be served and their needs. 20 U.S.C. §3806 (1982). To insure this equity, Congress has legislated that the expenditures and arrangements for such services shall be equal, taking into account the number and needs of the

children. *Id.* These provisions and requirements are further stated in the Regulations found in 34 C.F.R. §200 and 45 C.F.R. §116 (1983) which repeat and further expedite the requirement of "participation on an equitable basis" of such children. This is to be "a basis comparable to that used in providing for the participation of public school children."

In *Wheeler v. Barrera,* 417 U.S. 402 (1974) this Court upheld the aforesaid Congressional legislation and its requirements for comparable treatment and benefits for nonpublic, including church-related school children. In this connection the Court mentioned, but declined to decide concerning the constitutionality of on-premises instruction by public school teachers, observing that federal Courts do not sit to decide hypothetical cases and that "First Amendment implications may vary according to the precise contours of the plan that is formulated." *Wheeler v. Barrera,* as cited, at 426.

Meanwhile, in the New York application of Title I of the E.S.E.A., after trying various alternatives, it was found that both off-premises instruction in public schools after school hours and on-premises instruction in nonpublic schools after school hours were poorly attended and had poor results. Cost studies also demonstrated that busing nonpublic school students to public schools during school hours would cost almost half (42%) of the total budget for such students, and thus provide a lesser amount of educational services for a smaller number of students as compared to those provided for public school students. This was due not only to the greatly increased cost, but also to the loss of time involved in the transfer of students.

It was decided that the most practical and effective—perhaps the only way to provide comparable services for nonpublic school students—was to provide on-premises remedial educational services by public personnel during regular school hours. *Felton v. Secretary,* 739 F.2d 48 (1984). In formulating the New York program, careful attention was paid to prior decisions and opinions of this Court. The possible constitutionality of such a

program seemed to have been intimated in *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426, as well as by the judgment and opinion of Justice Brennan in *Nebraska State Board of Education v. Hartington,* 195 N.W.2d 161; *cert. denied,* 409 U.S. 921 (1972) at 926.

2. Denial of the constitutionality of the New York application of Title I of the E.S.E.A., in the absence of a substantial and compelling reason for such denial, would unjustly penalize constitutional rights of parents and children who use church-related schools.

a) It is unlawful to penalize the exercise of a constitutional right in the absence of a compelling governmental reason.

It is unlawful to penalize the exercise of a constitutional right without a substantial and compelling governmental reason since such penalization could inhibit or even completely frustrate the exercise of a constitutional right.

In *Thomas v. Collins,* 323 U.S. 516 (1944) this Court said: "Only the gravest abuses, endangering paramount interests, give occasion for possible limitation" of such a right as that of freedom of communication and information. The same principle would apply to freedom of education. *Thomas v. Collins,* as cited, at 530. In *Torcaso v. Watkins,* 367 U.S. 488 (1961) the same principle was maintained.

In *Speiser v. Randall,* 357 U.S. 513 (1958), in declaring unconstitutional California's denial of tax-exemptions for veterans who refused to subscribe to a loyalty oath, this Court declared that a burden—direct or indirect—may not be placed upon the exercise of a constitutional right without a compelling and substantial governmental interest. *Speiser v. Randall,* as cited, at 526-527.

In *Sherbert v. Verner,* 374 U.S. 398 (1963) this Court reaffirmed the same general principle. *Sherbert v. Verner,* as cited, at 402-403 and 406-407. In this case, which concerned a Sab-

batarian who had been denied unemployment benefits because she refused to work on Saturday, the Court added: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (Citations omitted). *Id.* at 404.

b) Denial of the comparable educational services provided by the New York application of Title I for children in church-related schools would penalize the exercise of the constitutional rights of parents and children. Parents, as has been seen, have a right under the Constitution to educate their children in church-related schools, and their children have a corresponding right to this education. These rights are based not only on personal freedoms implied by the Constitution in general, but also on the free exercise of religion and freedom of communication and information provisions of the First Amendment, as has been seen.

Parents and their children have a right to share in educational benefits accorded them by Congress based on the equal protection and equal treatment provisions of the Fourteenth Amendment. The latter requires that citizens be allowed to share equally in the benefits afforded by governmental legislation without "invidious classifications." The latter principle was applied by this Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969), when the Court struck down the requirement of one year of residency for eligibility for welfare benefits, saying that this would be "an invidious discrimination, denying them (those excluded) equal protection of the laws" and would "chill" the constitutional right of the poor and migratory to travel from state to state. *Shapiro v. Thompson,* as cited, at 627.

Denial of a comparable share in general benefits accorded to students in the case of students in church-related schools would penalize and handicap both their rights and those of their parents. It would unnecessarily deprive them of educational benefits to which they are entitled by law, and would adversely affect their present and future education as well as their future prospects. It would penalize the exercise of parental rights since

it would impede and financially penalize the parental right and obligation to educate their children, make it desirable or obligatory for them to purchase educational services which would otherwise be supplied without cost, and would also influence them to abandon their otherwise free choice of schools and send their children to public schools so that they could receive these services.

c) There is no adequate or compelling and substantial governmental interest demanding denial of participation in New York application of Title I to private school parents and their children.

The constitutional rights of parents and students favor allowance of their participation in the efficient, effective New York application of Title I of the Elementary and Secondary Education Act. These rights are important and essential for the preservation of our democratic freedoms. There are no proportionate compelling and substantial adverse reasons requiring nullification of the New York program.

The Appeals Court of the Second Circuit struck down the New York program on the basis of alleged "excessive entanglement." But it has been shown clearly that the program does not involve excessive political entanglement. Neither does the program involve excessive general or administrative entanglement. The New York application of Title I does not include or necessitate extreme surveillance of the instruction or processes of the church-related schools themselves or the latter's own teachers. The program does not threaten seriously to inhibit religion, which is the evil that avoidance of excessive general or administrative entanglement seeks to obviate. It is true that there might be some reduction of the time that could otherwise supposedly be spent in religious instruction and that there is increased contact with persons (teachers) of other persuasions. But the supposed loss of time and distracting contact would not be serious since the time would be minimal and most other teaching of alternative related secular subjects in the schools is

actually not saturated with religion to the point supposed. Due to the restrictions and supervision, the public teachers in the church-related schools would actually be less likely to inculcate their own religious views than in the public schools, where such specific restrictions and supervision are absent.

3. The rights of parents who send their children to church-related schools allow and require a considerable degree of contact and involvement between government and church-related schools.

If parents send their children to church-related schools and if government confers certain benefits on these parents and their children along with public school parents and children, contacts of government with these children and parents as well as with their freely chosen schools are necessary.

These contacts, which are caused by governmental activities, do not necessarily decrease religious freedom; rather they serve to protect it.

III. The advanced degree of socialization of elementary and secondary education in the United States requires allowance of considerable contacts and involvement between government and church-related schools if personal freedoms are to survive.

A. Socialization, or application of the principle "From each according to his means; to each according to his needs" requires allowance of considerable contacts between government and voluntary private insitutions, if the latter and the personal freedoms they represent are to survive.

In an article in the *Harvard Law Review,* Professor Gianella makes the point that increasing government subsidization and activity in various social welfare and educational fields necessitates increased contact with private organizations, including church-related ones, operating in these fields. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle,* 81 Harvard Law Review, 513 (1968).

As socialization proceeds, governmental contacts with private institutions must be allowed to increase if the private choices and personal liberties these institutions represent are to survive. This point is readily apparent if we suppose a country with more or less complete socialization, such as the Soviet Union, as does Professor Gianella. *Id,* at 522-523. Private interests and choices are expressed and implemented by voluntary social institutions, such as private hospitals, homes for the needy and aged, and schools. To the degree that public institutions are maintained and financed, while private institutions are starved and made uncompetitive, personal freedoms will wither. When government extends its activities and subsidization in social welfare and educational fields, it should also extend its subsidiary contacts with voluntary private institutions, including church-related ones or their students, Congress has done this in passing and amending the Elementary and Secondary Education Act of 1965, which New York is effectively implementing.

B. Socialization of elementary and secondary education in the United States has proceeded to the extent that it dominates this field and constitutes the leading example of a general trend to socialization.

The general level of socialization in the United States is best measured by public spending. Government expenditures on federal, state, and local levels, as a percentage of Gross National Product (GNP) equaled 37.2% of the GNP in 1978, as compared to 8% in 1902; and these expenditures will equal 50% by the year 2040 if the present growth rate continues. Expressed as a percentage of national income or personal income, public expenditures equaled 46.1% in 1978, an increase from 38.1% in 1952; and will, if they progress at the rate of recent decades, reach 50% by the end of the 1980s. Federal expenditures increased by 163% (in constant dollars) between 1952 and 1978. State and local expenditures increased by 385% in the same period, or from 7.3% to 14.3% of GNP. (Sources of information for this section are cited at the end of the section.)

There were sharp increases in governmental expenditures between 1913 and 1922, and between 1932 and 1945, primarily due to the fiscal effects of World Wars I and II. The growth rate of public expenditures since 1952 has been proceeding at a still very substantial rate. Omitting the costs of wars and national defense, all other governmental expenditures, mostly for domestic services, grew by 498% between 1952 and 1978, whereas personal consumption grew by only 153% in the same period (both in constant dollars), and population increased only 39%.

Governmental expenditures for domestic purposes grew steadily during the first half of the twentieth century, approximately doubling their share of the GNP. Then they virtually exploded. Outlays for domestic services (federal, state, and local) jumped from 38% of total governmental expenditures in 1952 (or 10.2% of GNP) to 76% in 1978 (or 24.5% of GNP). Most of the growth occurred in three functional areas: income support; health and hospitals; and education.

Total governmental expenditures for education increased from $8.4 billion in 1952 (2.4% of GNP) to $120.8 billion in 1978 (5.7% of GNP). At the federal level, expenditures for education increased from $326 million in 1952 (0.1% of GNP) to $12,574 million in 1978 (0.6% of GNP) a 1.470% increase in constant dollars. At the state and local level, expenditures for education increased from $8,247 million in 1952 (2.4% of GNP) to $116,120 million in 1978 (5.5% of GNP), a 473% increase (in constant dollars) during this period.

Education is America's largest and most ebullient growth industry, involving in 1978 thirty percent of our total population, mostly on a full-time basis — 59 million as students and 6.6 million as employees. Educational institutions in the United States expend 7.5% of the GNP compared to 4.1% in the Soviet Union. Similar ratios exist between the United States and France, West Germany, and England, All of the latter provide substantial public aid to private education, in contrast to the Soviet Union, which denies such assistance.

In the United States, most education is government-operated, and about ninety percent of students at the elementary and secondary level are enrolled at governmental institutions. About 10% of the funds for public education in the U.S. comes from the federal government. Education, which is the largest item in state-local government finance, represented 38.3% of total state-local expeditures in 1978. Employees in public education have increased by 250% from 1952 to 1978, and now constitute about 6.8% of total employment in the U.S. The average cost of public education has increased 219% in constant dollars, increasing from $301 in 1952 to $2,288 in 1978 and an estimated $3,000 in 1984.

Since its passage in 1965, the federal Elementary and Secondary Education Act (ESEA) has been supporting educational projects in about 14,000 school systems, involving 7 to 9 million children with an aggregate cost exceeding $35 billion.

Statistics in this section are derived from the following sources: The *National Income and Product Accounts of the United STates, 1929-1974,* a supplement to the *Survey of Current Business,* 1977, for 1978 (U.S. Department of Commerce, Bureau of Economic Analysis); *Survey of Current Business, National Income Issue, July 1967 - July 1979* (U.S. Department of Commerce, Bureau of Economic Analysis); *Historical Studies on* Governmental Finance and Employment, (U.S. Bureau of the Census, 1977 Census of Governments, 1979; Raymond W. Goldsmith, *A Study of Savings in the United States* (Princeton, N.J,: Princeton University Press, 1956) 2:427; *Statistical Abstract of the United States 1984,* (U.S. Bureau of the Census, 1983); *Digest of Education Statistics, 1979,* (National Center for Education Statistics, 1979); *Statistical Summary of Education, 1951-52,* (U.S. Office of Education, 1955); and *The OECD Observer,* March 1979.

C. The high degree of socialization of elementary and secondary education in the United States as well as that of general socialization requires considerable contact and cooperation bet-

ween government and private, including church-related schools as well as their students to protect personal rights.

The advanced degree of socialization in the field of elementary and secondary education in the United States requires that government maintain cooperative relationships with private institutions in order to preserve personal freedoms. In virtually all other areas of governmental activity, except elementary and secondary education, such cooperative arrangements and contacts between the government and private institutions and individuals exist, with freedom of the aid recipient an important consideration.

Continued attempts to deny any form of substantial public aid to students in non-governmental schools, in spite of advancing socialization, based solely on considerations of supposed excessive entanglement between church and state, could result in the inhibition of important personal freedoms.

It has been urged that the supervision or surveillance required by the New York application of Title I, minimal as it is, would constitute excessive entanglement. It has been shown that this is not the case. Some degree of contact and cooperation between government and voluntary church-related institutions is required if progressive socialization of education is not to result in a total eclipse of personal liberties in this field. Rather than threaten freedom of religion, such limited contacts prevent its destruction.

Respectfully submitted,

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MOTION FILED
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Nos. 84-237 and 84-238

In The
Supreme Court of the United States

October Term, 1984

YOLANDA AGUILLAR, *et al.*,

Appellants,

vs.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,

Appellant,

vs.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")

Pursuant to Rule 42 of the Rules of this Court, the National Jewish Commission on Law and Public Affairs ("COLPA") hereby moves for leave to file the attached brief *amicus curiae.*

As indicated by letters on file with the Clerk, the movant has obtained the consent of the parties for the filing

of the brief, counsel for appellees conditioning his consent to our filing by October 25, 1984. The Court postponed the question of jurisdiction in this case to the hearing on the merits on October 9, 1984. It did not order an expedited briefing schedule, but the appellants filed their briefs on October 15, 1984, in order to enable the Court to hear this case together with *School District of the City of Grand Rapids v. Ball,* No.83-990. The Clerk has informed the parties that argument on this case has been tentatively scheduled for December 5, 1984 to follow No. 83-990. Appellees' brief is to be filed on or before November 15, 1984.

The National Jewish Commission on Law and Public Affairs ("COLPA"), has participated *amicus curiae* in numerous cases before this Court involving the Religion Clauses of the First Amendment. See, e.g., *Board of Education v. Allen,* 392 U.S. 236 (1968); *Walz v. Tax Commission,* 397 U. S. 664 (1970) *Dewey V. Reynolds Metals Co.,* 402 U. S. 689 (1971); *Lemon v. Kurtzman,* 403 U. S. 602 (1971); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U. S. 756 (1973); *Wheeler v. Barrera,* 417 U.S. 402 (1974); *Parker Seal Co. v. Cummins,* 429 U. S. 65 (1976); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); *Widmar v. Vincent,* 102 S. Ct. 239 (1981); *Mueller v. Allen,* 103 S. Ct. 3062 (1983); *School District of the City of Grand Rapids v. Ball,* No. 83-990.

Since the parties proceeded unilateraliy on an expedited basis, the time authorized by Rule 36.2 of the Rules of this Court for the filing of an *amicus* brief has been severely curtailed. It was not possible for the attached brief to be prepared for filing by the time appellants' briefs were submitted. Inasmuch as counsel for appellees

has consented to the filing of the *amicus* brief on or before October 25, 1984, leave to file this brief will not delay the Court's consideration of this case.

The arguments made by the National Jewish Commission on Law and Public Affairs ("COLPA") with regard to the consititutional issues in this case differ from those presented by the parties. From counsel's examination of the briefs filed to date, it appears that none presents the constitutional analysis set forth in the attached brief.

For the foregoing reasons, the National Jewish Commission on Law and Public Affairs ("COLPA") requests that leave be granted to file the attached brief *amicus curiae.*

Respectfully submitted,

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The National Jewish Commission on Law and Public Affairs ("COLPA") is the volunteer non-profit member-

ship organization of lawyers and social scientists that represents the Orthodox Jewish community in public forums on legal issues that affect the community. We speak, in this case (as we have frequently done before)[1] on behalf of a broad spectrum of the American Orthodox Jewish community, including the following national Orthodox Jewish rabbinic, synagogal, educational and social service organizations which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

In addition, COLPA files this brief on behalf of the Board of Jewish Education of Greater New York, the

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1. E.g. *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Trans World Airlines, Inc. . Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 102 S.Ct. 239 (1981); *Mueller v. Allen*, 103 S.Ct. 3062 (1983); *School District of the City of Grand Rapids v. Ball*, No. 83-990.

educational service agency of the Federation of Jewish Philanthropies of New York.

This case is of direct concern to the Orthodox Jewish community because the decision below wipes out a federally financed program that has assisted thousands of educationally disadvantaged Jewish children residing in low-income neighborhoods by providing for them remedial reading and remedial mathematics programs (taught predominatly by non-Jewish teachers, responsible only to their secular supervisors in the public-school system) merely because these rememdial classes are given in the same buildings where the children receive their religious teaching. The court of appeals recognized that this 18-year-old program had done "much good and little, if any, detectable harm" but nevertheless declared it invalid in an unusual, speculative opinion—after a 3-judge district court had upheld Title I's constitutionality in another action on the same facts, *National Coalition for Public Education and Religious Liberty v. Harris,* 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed, 449 U.S. 808 (1980). The action of the court of appeals is apparently based on its belief that in a 1975 decision a majority of this Court forever barred all forms of publicly financed secular instruction on the premises of a religious school.

The 1975 decision—*Meek v. Pittenger,* 421 U.S. 349—was rendered in a factual vacuum. The Court arrived at certain stated conclusions because it evaluated a challenged law on its face and assumed, from the lack of evidence, that "entanglement" problems would arise in the law's administration. The approach taken by the Court in *Meek v. Pittenger* was analogous to that which the Court takes when it invalidates on its face a law affec-

ting speech because the overbreadth of the law may "chill" protected expression, even if the record fails to demonstrate that protected speech is involved in the particular case.

But this Court has recently warned of the shortcomings of such constitutional analysis of laws affecting speech. The constitutionality of duly enacted and implemented governmental programs should be judged by the experience shown in an actual record, not by hypothetical possibilities that lawyers can imagine. If New York City's administration of the Title I program, as shown by a record of actual performance, is measured against the "entanglement" standard of the First Amendment, it becomes clear that the law is valid because there has not been any "entanglement" of the kind to which the Establishment Clause is directed. New York's real-life experience also demonstrates that its Title I program uses premises other than purely secular and public facilities only when it is absolutely necessary.

There is, in short, a familiar constitutional approach that this Court may apply in deciding whether the *Meek v. Pittenger* "entanglement" rationale applies to this case—the "First Amendment overbreadth doctrine" utilized in cases involving the regulation of speech. New York City's administration of Title I should not be invalidated because of unsubstantiated fears that it may, in the future, result in violations of constitutional liberties if, in actual practice, such violations have not occurred and if the record demonstrates that an important state interest can be carried into effect *only* by the means chosen in the challenged program.

ARGUMENT

I.

THE TITLE I PROGRAM SHOULD NOT BE INVALIDATED BECAUSE IT MIGHT RESULT IN IMPERMISSIBLE "ENTANGLEMENT" IN CASES NOT SHOWN BY THE RECORD

In a recent case involving a statute that dealt directly with speech, this Court repeated "the traditional rule" (*New York v. Ferber*, 458 U.S. 747, 767 (1982):

> [A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situtations not before the Court.

The Court explained why resort to hypothetical possibilities was an imprudent means of determining a law's constitutionality (458 U.S. at 768; footnotes omitted):

> By focusing on the situation before us, and similar cases necesary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment."

In the present case Judge Friendly acknowledged for the court below "that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion." The court of appeals held, nonetheless, that the Title I program was unconstitutional—not because in its 18 years of implementation there had been many or some instances of "entanglement" bet-

ween church and state, but only because of a "reasoned apprehension of potentials."

In substance, the court below struck down New York's Title I program because of a concern that administration of law might hypothetically result in "comprehensive, discriminating, and continuing state surveillance" (*Lemon v. Kurtzman,* 403 U.S. 602, 619, (1974)) of the kind prohibited by the Establishment Clause. In fact, the record showed no complaints regarding any excessive state instrusion or policing of the internal affairs of religious schools during the 18 years that Title I programs have been administered by New York City.[2] Hence the law was declared unconstitutional entirely because it might "conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber,* 458 U.S. 747, 767 (1982).

That kind of constitutional analysis was described by this Court in *Ferber* as "strong medicine" that is warranted "only as a last resort." 458 U.S. at 769, quoting from *Broadrick v. Oklahoma* 13 U.S. 601 (1973). The Court concluded, therefore (458 U.S. at 771):

> that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications....

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2. Judge Friendly may be correct in asserting that there was no "incentive for complaint" if any teacher fostered the religion taught in a private school. But, as he noted, the critical issue under *Meek v. Pittenger* was not whether religion was fostered, but whether there had been any "entanglement." The non-public schools had every "incentive to complain" if their independence had been infringed by an inspecting or supervising state official in the administration of Title I. The absence of any such complaint demonstrates that the fear of "entanglement" is chimerical.

In this case, as in *Ferber,* the "legitimate reach" of Title I and of programs of the kind challenged by the plaintiffs "dwarfs its arguably impermissible applications." 458 U.S. at 773. Even if there is a *possibility* that an isolated teacher will be "influenced by a sectarian milieu" or that "active and extensive surveillance" by the City will occasionally be needed to prevent religious influences, there is no question that the overwhelming preponderance of classes taught in the administration of New York's Title I program result in no such dubious consequences. It is inappropriate, therefore, to declare the entire program unconstitutional because of a fear over an unusual possibility that has not been realized.

Meek v. Pittenger, 421 U.S. 349 (1975), can be understood in this context as a case that considered a particular local law as to which no record had been made regarding its constitutional or unconstitutional applications. This Court held that, in such a framework (421 U.S. at 369):

> [T]he District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

In the absence of any evidence whatever, the Court assumed that the "prophylactic contacts" necessary to assure that the local program would be free of sectarian taint would "necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." 421 U.S. at 370. But by using the word "necessarily," the Court majority did not mean to create an irrebuttable presumption of fact. At most, the Court was expressing its understanding of the kind of conduct contemplated by the local law. That understanding can be rebutted by evidentiary facts, and this record contains a wealth of such facts.

II

THE RECORD DEMONSTRATES THAT THIS PROGRAM IS NECESSARY TO IMPLEMENT THE IMPORTANT STATE INTEREST IN EDUCATING DISADVANTAGED YOUNGSTERS

Another related doctrine utilized in freedom-of-expression cases under the First Amendment is useful here. When expression or association is restricted or limited, it is frequently relevant to inquire whether the restriction, if otherwise permissible is excessive — *i.e.*, whether "the governmental interest could be served as well by a more limited restriction...." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 564 (1980). A law which otherwise restricts speech and association may be constitutional if it is the narrowest available means to implement a compelling state interest. Conversely, it is unconstitutional if it sweeps more broadly than necessary. *E.g., Shelton v. Tucker,* 364 U.S. 479, 488 (1960). ("The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.") This doctrine has been applied, in a different context, to freedom-of-religion cases as well. *E.g., Cantwell v. Connecticut,* 310 U.S. 269, 304 (1940). *See generally, Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *In re Primus,* 436 U.S. 412, 432-33 (1978).

The Court in *Meek v. Pittenger,* 421 U.S. 349 (1975), was faced with a local law that appeared to reach farther than necessary to achieve the legitimate secular objective. Pennyslvania's Act 194, adopted in 1972, declared that children in nonpublic schools were entitled to receive "auxiliary services" from the Commonwealth because their parents were taxpayers, and provided immediately for the allocation of funds to establish "auxiliary services" programs on the nonpublic school premises. 421

U.S. at 352-53, n.2. No showing was made that such services could not be provided in the public schools or at other locations. This Court (as well as the plaintiffs) acknowledged the legitimacy of the secular purpose of the law—"to assure full development of the intellectual capacities of the children of Pennsylvania." 421 U.S. at 367-68. But there was no explanation as to why this result could be achieved, as to enrolless at nonpublic schools, only on their own premises. It seemed possible to supply such services at public school facilities or elsewhere.

The same cannot be said of Title I. The statute does not, by its express terms, direct funding of classes at nonpublic schools. The record establishes that Title I programs were first offered by New York City at public schools after regular school hours. But attendance was poor, as was true when the programs were offered in the private schools after school hours. See Juris St. of the Solicitor General, p. 7. Active consideration was even given to conducting the programs at public schools during school hours, but legal and budgetary problems barred that solution.

The *only* remaining effective means of delivering the remedial services provided by Title I to students at nonpublic schools was to conduct them on nonpublic school premises during school hours. And the best means of achieving a secular and nonsectarian content to these classes was to assign public school personnel to teach at the private school prmises under the supervision of public school administrators.

In every real sense, therefore, the means selected to implement the important governmental goal of Title I involved the least possbile interaction betweeen secular and religious authorities. Under this Court's decisions in the

area of expression, the record establishing that narrow choice lends added constitutional support to the program that is being challenged.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 84-237, 84-238 and 84-239

IN THE

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OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*, *Appellants*,

v.

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SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, *Appellant*,

v.

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On Appeal From The United States Court Of Appeals For The Second Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND G. HUGH WAMBLE AS *AMICI CURIAE*

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On Appeal From The United States Court Of Appeals For The Second Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND G. HUGH WAMBLE AS *AMICI CURIAE*

INTEREST OF AMICI CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United has a membership of some 50,000 members of various religious beliefs and some of no religious beliefs in all states of the United States, including the State of New York. Americans United is involved in extensive litigation of

First Amendment Free Exercise and Establishment issues throughout the United States.

Americans United is particularly interested in the issues raised in this case because the decision may directly affect two cases in which Americans United is currently participating. Those cases are *Wamble* v. *Bell*, United States District Court, Western District of Missouri, Western Division, Civil Action No. 77-0254-CV-W-8, which is presently awaiting a decision on the merits; and *Barnes* v. *Bell*, United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-80-0501-L(B). Both of these cases involve challenges under the Establishment Clause of the First Amendment to Title I of the Elementary and Secondary Education Act of 1965. In fact, in the brief of the Secretary of Education filed in the instant action, both the *Barnes* and *Wamble* cases are specifically referenced (see Brief for the Secretary of Education, p. 10). In addition, the brief of the government has referred to studies which specifically involve the Missouri Title I program (See Brief for the Secretary of Education, p. 10, n.7 and pp. 10 and 11, n.9).

Dr. G. Hugh Wamble is the plaintiff in *Wamble* v. *Bell*, *supra*. Note is made of the fact that the Question Presented is stated in broad terms—that being whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for edu tionally deprived children (in public or private schools) in low income areas violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

A decision in this action may well have a direct bearing on plaintiff Wamble's suit in Missouri. These amici will contend that the providing of teaching services on the premises of church-operated schools violates the Establishment Clause of the First Amendment to the United States Constitution.

INTRODUCTORY STATEMENT

Although the appeal in this case only directly involves New York City's Title I program, appellants have chosen to broadly state the question presented in order to obtain a response from this Court as to whether Title I violates the Establishment Clause of the First Amendment when public school teachers provide the services on the premises of religious schools. Although not revealed in any of the briefs of the appellants, almost all of the Title I services currently provided throughout the nation to nonpublic school students are administered on the premises of nonpublic schools. Thus, a decision in this case will have national impact.

Unfortunately, this case goes up on a paper record devoid of many of the facts which should be in the possession of the Court when deciding a constitutional question of this magnitude. Americans United for Separation of Church and State and G. Hugh Wamble respectfully submit that a fuller record would be more desirable.[1]

This case does not simply present the Court with the responsibility of resolving disputes among private parties—rather, it involves the determination of issues impacting one way or another on a large segment of our population and perhaps establishing or affecting principles of law of great importance to church-state contacts.

This suit does not merely seek to clarify the meaning of the law remitting the parties to private ordering of their affairs,

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[1] Unlike the instant case, in *Wamble* v. *Bell* the court devoted 21 days to trial and on March 30, 1983, provided a full day for oral argument. During the course of the trial 23 live witnesses testified, and the court received additional testimony in the form of depositions from 35 witnesses. In addition, approximately 800 documents were offered and received into evidence. One of the issues directly presented to the court involved the action taken by the Commissioner of the United States Department of Education as a result of the report furnished to the Commissioner which is referred to in the Brief for Secretary of Education at pp. 10 and 11, n.9.

but itself establishes a regime ordering the future interaction of the parties and of absentees as well.

It is respectfully submitted that this case requires the Court to take judicial notice of matters not formally of record in the pending litigation. See *Wilson* v. *Sigler*, 285 F.2d 372, 383 (8th Cir. 1961), and *United States* v. *Verlinsky*, 459 F.2d 1085, 1089 (5th Cir. 1972).

It is further suggested that this is an appropriate circumstance for the Court to take judicial notice of proceedings in other courts within the federal judicial system, particularly since reference has been liberally made concerning studies in Missouri which directly impact on the case of *Wamble* v. *Bell*, *supra*. See *St. Louis Baptist Temple, Inc.* v. *Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).[2]

SUMMARY OF ARGUMENT

The Court of Appeals has faithfully followed the prior decisions of this Court in reaching its opinion that the New York Title I program providing remedial education at taxpayers'

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[2] Judicial notice may even be taken of briefs filed in other courts, *United States* v. *Walters*, 510 F.2d 887, 890, n.4 (3d Cir. 1975), including amici briefs since they are matters of public record, and their contents are subject to scrutiny and analysis by the Court. *Happy Investment Group* v. *Lakewood Properties, Inc.*, 396 F.Supp. 175, 183, n.6 (N.D. Cal. 1975). In fact, notice may be taken by the Court of public records lodged with governmental agencies, *White* v. *Califano*, 437 F.Supp. 543 (D. S.D. 1977). Amici will, in this brief, from time-to-time, refer to the record in the United States District Court for the Western District of Missouri in *Wamble* v. *Bell*. In this regard, it should be noted that the evidence referred to will relate to testimony by officials of the United States Department of Education and of documents authored or received by them. The purpose of these references is not to prove or disprove the claim of the plaintiff in *Wamble* v. *Bell* but to bring to bear on the broad issue presented to the Court factual information necessary for a constitutional determination. *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402, 410 (1925). Citations to "___ testimony, ___ Tr ___" are to the transcript of the trial of *Wamble* v. *Bell*, *supra*. Relevant pages from the transcripts or exhibits referred to are annexed hereto as an Appendix to this Brief and referred to as "___a."

expense on the premises of church schools violates the Establishment Clause of the First Amendment.

Not only was the Second Circuit correct in its application of the prior decisional law, but any other conclusion would ignore reality and defy logic. An analysis of the result of validating this type of a program clearly reveals that the providing of instruction in sectarian schools would create a continuing danger of future undetected advancement of religion at taxpayers' expense. In addition, this program fusing secular education at taxpayers' expense with religious education would directly advance the educational ministry of the sponsoring church, thus resulting in an application of public funds in a manner having the primary effect of advancing religion.

The on-premises Title I program also creates numerous entanglement problems which result from the shared use of the same church-school facilities and the overlapping jurisdiction over the same students during the school day. This arrangement is pregnant with dangers of government intrusion into the institutional affairs of religious institutions without any effective means of monitoring against constitutional abuse.

The prior holdings of this Court suggest that where there are various alternatives available in the providing of federally-supported services, and there is a potential for church-state entanglement, the least entangling alternative should be sought in administering such a program. For this reason, Title I services made available to students attending nonpublic schools should be provided at religiously-neutral sites. Such an arrangement will not only reduce the possibility of the program advancing religion and creating excessive entanglement, but will also maximize the benefit of the services to nonpublic school students who would otherwise be denied the entitlement because they are not enrolled in a religious school where the church and state have entered into a partnership.

Although appellants claim that the prior holdings of this Court concerning aid to pervasive sectarian schools are not applicable to the religious schools in New York where Title I services are provided because of a claimed variation from the

Meek profile, such defense must fail. This Court has repeatedly indicated that it will not be wedded to a formal list of criteria for determining whether a church-operated elementary or secondary school is pervasively sectarian.

The fusion of government-sponsored education with the religious educational ministry provided on the premises of church schools with the ever-present religious atmosphere violates the Establishment Clause of the First Amendment and must be struck down. Title I services should be provided both to public and nonpublic school students, but not in violation of First Amendment rights.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS IS FULLY SUPPORTED BY THE PRIOR DECISIONS OF THIS COURT.

When reduced to the simplest terms, the core issue in this case is whether a federal program utilizing public school teachers to provide educational services within church-operated schools is a violation of the Establishment Clause of the First Amendment to the United States Constitution.

Every analysis in this area of constitutional inquiry must start with a consideration of the cumulative criteria developed by this Court over many years. In its consideration of cases implicating the Establishment Clause over the past two decades, this Court has developed three criteria by which to measure the constitutionality of a government act or action:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . , finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

Later, in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 783-785, n.39 (1973), this Court amplified the meaning of the "primary effect" standard:

> Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. . . . Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might, "*in part* have the effect of advancing religion." 403 U.S., at 638 (emphasis supplied). . . .
>
> [S]ecular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify . . . a direct and substantial advancement of religion.

In *Lemon* v. *Kurtzman*, *supra* at 602, the Court delineated the meaning of excessive entanglement. It ruled that Rhode Island's Salary Supplement Act, which authorized salary supplements for non-public school teachers who taught only those courses offered in the public schools, violated the First Amendment. This Court noted in *Lemon*, *id.*, at 618:

> Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid.

This Court in *Lemon* added that the Court need not assume that parochial school teachers will be guilty of bad faith or have any conscious design to evade First Amendment limitations and said:

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to

> make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

Id. at 618-619.

It makes no constitutional difference that the teachers are not employed by a religious organization or directly subject to the direction and discipline of religious authorities. These facts were found to be irrelevant in *Meek* v. *Pittenger*, 421 U.S. 349, 370-371 (1975). In *Meek*, the remedial reading teachers were not employed by a religious organization or subject to direct religious authority. Like the instant case, the teachers in *Meek* were public school employees providing remedial reading services on the premises of church schools. Nevertheless, this Court said that this:

> . . . does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. . . . [citation omitted] But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. . . . [citation omitted] The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to insure that those restrictions were being followed.

Id. at 371-372.

Later this Court in *Wolman* v. *Walter*, 433 U.S. 229, 247 (1977), which also involved public school employees, stated that the constitutional danger arose because the services performed by the publicly employed personnel were rendered in the pervasively sectarian atmosphere of the church-related school. The *Wolman* Court observed that "[t]he danger existed there, not because the public employee was likely

deliberately to subvert his task to the service of religion, but rather because the pressures of the environment [not of the parochial school principal] might alter his behavior from its normal course." *Ibid.* See also *Public Funds for Public Schools* v. *Marburger*, 358 F.Supp. 29, 40 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974)

The most recent decision of this Court involving the Establishment Clause, *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (March 5, 1984), has neither cast aside the three-part *Lemon* test nor repudiated *Meek* or *Wolman*. In fact, this Court in *Lynch*, reaffirmed many of its prior decisions, including *Lemon*, *Nyquist*, and *Meek*.

In *Lynch*, this Court discussed the Court's previous differentiation between an on-premises shared-time program found unconstitutional in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), and an off-premises released-time program determined constitutional in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). *Id.* at 1363-1364.

II. LOGIC CONFIRMS THE PRIOR HOLDINGS OF *MEEK* AND *WOLMAN*.

The Second Circuit Court of Appeals viewed the sparse summary judgment record and correctly observed that the ever-present potential for advancing religion was present in this case. The Court of Appeals noted that children in 51 of the 231 nonpublic schools received remedial instruction from public school teachers who regularly taught in such schools. The Court also noted that many of the Title I teachers taught in schools which shared their own religious affiliation.

This Court in *Meek* was concerned that "the pressures of the environment might alter . . . [the teachers'] behavior from its normal course." 433 U.S. at 247. The remarkable perception of this Court in *Meek* seems to be supported by Monsignor John J. Leibrecht who writes:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing

> called atmosphere. It comes not from the physical facilities, or the religious classes, or the students—at least not chiefly. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves to the totality of curriculum.
>
> * * *
>
> When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is the spirit created by the common Christian life conscienciously lived by the faculty and participated in by the students.

Leibrecht, "Thoughts on the Catholic School," *The Catholic Educator*, 27 at 28, 33 (May, 1966).

If a student can become subsumed in the atmosphere of the church school, the Court is rightly concerned with the potential for subtle pressures being exerted upon teachers of common religious faith by the sponsoring church.

Professor Donald A. Giannella described a similar concern embraced in the Court's decision in *Meek* v. *Pittenger*, *supra:*

> . . . as a recent study of Catholic parochial education points out [Notre Dame Report, Catholic Schools in Action, 17 (R. Neuwien ed. 1966): "the very presence of the religious [teachers and administrators] is in itself a dominant, unforgettable symbol." This pervasive atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations.
>
> In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the dis-

> qualifying religious function of molding the religious personality of the young student.

Giannella, "Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle," 81 Harv. L. Rev. 513, 574 (1968).

We believe that the decision in *Meek* prohibiting public school teachers from conducting classes within the church schools is not only logical but necessary if the Establishment Clause is to be effective. Parochial schools are not open to as much public scrutiny as public schools. Public schools include teachers and students of varying religious persuasions as well as those who may be strongly opposed to any form of religion. The public school's business is, in fact, public, and its governing boards are answerable to the voters. There is a diversity of religious and philosophical views represented on the boards and in the administration of the public schools not found in church schools. There is thus a built-in surveillance system which is usually present at the public school.

Conversely, in the church-operated school, the regular classroom teacher, the student or parent would not be so apt to blow the whistle on violations which may occur in the Title I room since sectarian teaching and activity are expected and accepted parts of the remainder of the school program.

Because of this readily apparent distinction between public and parochial schools, there is a greater likelihood that future violations would be more easily left undetected in the church school where those in attendance or control may not be at all sensitive to the concept of religious neutrality. This, in part, justifies decisions of this Court which reject aid programs on the basis of the "potential" or "danger" of violations rather than awaiting later exposures of unconstitutional application where funds have already been disbursed and the wrong has already been done.

Meek teaches that in sectarian schools where there is no internal built-in mechanism for surveillance[3] such as exists in public schools, there can be only one way of insuring the religious neutrality of a governmentally-financed program: an all pervasive and ever watchful governmental monitoring program which raises separate constitutional concerns as to excessive entanglement.

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[3] There is no statutory restriction whatever on the activities of Title I personnel teaching on church school premises. Federal Title I regulations are also devoid of any limitation or restrictions on the activities of Title I teaching personnel. Even if there were legislative or regulatory restrictions, there has not been any monitoring program set up to ferret out violations of the Establishment Clause. One of the counsel for the intervenor-defendants in the instant action, in commenting on this and other Title I cases, observed:

> That there are problems of a constitutional dimension in some of the pending Title I cases is significant for two reasons. First, we had assumed, somewhat naively, that the Title I program we defended in New York was a model of Title I instruction around the country. What we have discovered is that there are great deviations from the PEARL model, and in my view, the greater the deviation, the greater the risk the program will fail.
>
> * * *
>
> The second problem that has been disclosed by these deviations is that the policing of Title I is really very loose. There is virtually no monitoring at the federal level. At the state level, so few resources are allocated for Title I administration that each local school district is substantially free to do as it wishes. A consequence of this is the greater burden it places on diocesan and archdiocesan school officers to scrutinize the way Title I is being implemented within their particular jurisdiction and to discover incipient problems that could be intercepted before a lawsuit is filed.

Wilson, "ESEA Title I Litigation—A National View," *The Catholic Lawyer*, Sept. 1982, 231 at 235.

Mr. Wilbert A. Cheatham, Director of Compensatory Education for the United States Department of Education, and the person who had general administrative responsibility for Title I throughout the nation, was called by the government to testify in *Wamble* v. *Bell*, *supra*. Mr. Cheatham testified that in the United States, as a whole, federal personnel visit and monitor less than 1% of the 14,000 local educational agencies each year (Cheatham testimony, 11 Tr 149) (13a) due to the availability of only 70 to 125 persons to do the monitoring throughout the country (Cheatham testimony, 12 Tr 46) (19a).

Under general provisions applicable to Title I, there is a statutory requirement that nothing in Title I "shall be construed to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384. This, however, leaves the Title I teacher whose "professionalism" is the remaining protection against church-state violations, pretty much at sea.[4] More precision is required to prevent the otherwise inevitable disagreement as to when a teacher has crossed the constitutional barrier.

The appellants have attempted to distinguish this case from *Meek* on the basis that the services are provided in a religiously neutral classroom[5] set apart from the rest of the church school—a religiously neutral oasis where religious objects have been removed.

It is difficult to discern why a "desanctified" room within a church school which itself maintains instructive religious objects, curriculum, programs, and characteristics should provide less opportunity for the fostering of religion.

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[4] Federal auditors who testified in *Wamble* v. *Bell* found nothing in the federal regulations about what religious neutrality means (Livingston testimony, 14 Tr 65) (36a-37a). They came to the consensus view that Title I instructors should not provide "the class with various religious articles," not say "mass in the same room they are giving Title I," and that there should be no altars (Livingston testimony, 14 Tr 66) (37a). Although the program had been in operation for a number of years, out of nine schools investigated, the federal auditors found crucifixes on the Title I room walls of two schools in St. Louis, a religious picture on the wall of another room used for Title I, and a covered altar in a Title I classroom in Jefferson City (Livingston testimony, 14 Tr 66) (37a).

The auditor, however, failed to include these violations as a part of his report because after speaking with his Regional Inspector General he "felt that it to be not significant" (Livingston testimony, 14 Tr 66-67) (37a-38a).

[5] According to Wilbert A. Cheatham, there is no federal definition of "religiously-neutral" setting (Cheatham testimony, 11 Tr 150) (13a-14a). He further testified in *Wamble* v. *Bell*, *supra* that he would not know what to look for, and on-site Title I personnel would have to make the judgment about such a setting. (*Id.* at 150-151) (13a-15a).

III. A TITLE I PROGRAM CONDUCTED ON CHURCH SCHOOL PREMISES HAS THE EFFECT OF AIDING RELIGION.

To be sure, this aid program was designed to assist students, but so has every other aid program which has been struck down by this Court. If the program is a public benefit, no child should be excluded because of his or her parents' religious beliefs and practices. The Title I program is often defended against Establishment Clause attack on the basis that it is provided to the student and not the church school. However, unlike the bus transportation benefit validated in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the decision for the student to receive benefits is initially made by the school rather than the parent, and it is this arbitrary decision which determines if a nonpublic school student will be able to participate in the Title I program.[6]

When Title I services are provided only to students enrolled in a church school, and in a room which is physically an integral part of that school, another evil arises. As Professor Laurence Tribe argued:

> Apart from the significance of symbols in establishing precedents for more dangerous incursion, the fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concern as ultimately delegated to individual and community conscience.

Tribe, *American Constitutional Law*, § 14-12 at 868 (1978).

To an impressionable student, even the appearance of secular involvement in religious activities may be a symbolic influence too dangerous to permit. *Brandon* v. *Board of Educa-*

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[6] Wilbert A. Cheatham testified in *Wamble* v. *Bell*, *supra*, that if a nonpublic school does not elect to participate in the Title I program, perhaps because of its beliefs against receiving government aid, a child otherwise eligible for Title I benefits, but attending such a nonpublic school, would not be served by Title I. In fact, according to Cheatham, most Seventh-day Adventist schools elect not to participate (Cheatham, testimony, 12 Tr 114-122) (24a-31a). See *infra* p. 18 for entanglement implications.

tion, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154, (1981). See also *Widmar* v. *Vincent*, 454 U.S. 263, 273, n. 13 (1981).

Title I programs conducted within church schools inevitably tend to merge into the overall religious educational programs of the schools in which they operate. Parents and the community perceive the Title I program as part of the school curriculum.

The fusion of governmental and sectarian activity within the bosom of the church school itself carries with it the high risk that the program will be perceived as an endorsement of religion. See *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1368 (March 5, 1984) (O'Connor, J., concurring).

Appellants have attempted to justify the Title I program on the basis of the "child benefit" theory. In *Committee for Public Education* v. *Nyquist*, *supra*, this Court struck down a program that was a "hybrid" between a tax credit and a tax deduction. The Court in *Nyquist* rejected the "child benefit" theory offered in justification for the program and held that the tax benefit had "the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794. This Court in *Nyquist* stated:

> The controlling question here, then, is whether the fact that the grants are delivered to parents rather than to schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution. It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: as noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools and in *Allen* textbooks were loaned directly to the children. *But those decisions make clear that, far from providing a per se immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.*

Id. at 781. (Emphasis supplied).

To permit the child benefit theory to be extended in such a way as to permit public funds to be used for the providing for teaching staff on the premises of parochial schools would place form over substance. In fact, there would be no logical stopping point. What is the constitutional distinction between sending a teacher to a prochial school to provide remedial reading services and sending a teacher to a parochial school to teach reading itself? In both instances, services are directly related to the advancement of the religious missions of the schools whose pupils' learning abilities such services are designed to assist.

In *Wolman* v. *Walter*, *supra*, this Court faced an attempt by the State to use the child benefit theory to furnish instructional materials to nonpublic schools by claiming that the instructional materials were actually being furnished to the children and not to the schools. This Court, however, struck down this law stating that "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Id.* at 250.

The constitutional violation in this case is even clearer than in *Wolman*. In that case the Court was concerned merely with neutral and secular educational material and equipment. In this case we are concerned with teachers, a substantial portion of whom are of the same religious faith as the church which operates the schools in which they teach. Here we are dealing with teachers acting on an individualized basis with small groups of children. It is submitted that the decisions in *Meek* and *Wolman* stand for the proposition that the "child benefit" theory will not be permitted to validate a program whereby public school instructors teach within the four walls of a parochial school. In fact, in *Everson*, although the Court there upheld public payment of bus transportation on the grounds that the children were merely "receiving the benefits of public welfare legislation," it nevertheless stated in strongest dictum that this was as far as the Establishment Clause would extend. This Court in *Lemon*, *supra*, at 624 correctly observed that in

constitutional adjudication some steps which, when taken, were thought to approach "the verge" have become the platform for yet further steps. This Court should not permit such further erosion. "[C]ourts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded." *Lynch* v. *Donnelly, supra* at 1370 (O'Connor, J., concurring).

In *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), this Court reviewed a case that arose in Missouri relating to Title I. In *Wheeler* the Court considered two issues—one, whether Title I required the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students; and two, whether the requirement, if it exists, contravenes the First Amendment. The Court, however, concluded that it could not reach a decision on either issue on the record before it. Nevertheless, Justice Douglas, in a dissenting opinion, noted:

> Federal financing of an apparently nonsectarian aspect of parochial schools' activities, if allowed, is not even a subtle invasion of First Amendment prohibitions. . . . Allowing the State to finance the secular part of a sectarian school's program "makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries."

Id. at 431. (Douglas, J., dissenting).

Justice Powell, in a concurring opinion in *Wheeler*, agreed with the majority that in the posture that the case was then before the Court, it was "unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment." However, he added, "I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools," citing *Committee for Public Education* v. *Nyquist, supra*. *Id.* at 428. (Powell, J., concurring).

IV. THE PROVIDING OF TEACHING SERVICES BY PUBLIC SCHOOL TEACHERS WITHIN CHURCH SCHOOLS CREATES THE POTENTIAL FOR EXCESSIVE GOVERNMENTAL ENTANGLEMENT AND IS THUS UNCONSTITUTIONAL.

In their brief, the government rejects the contention that the Title I program creates excessive entanglement between church and state. However, the government seems to primarily deal with entanglement in the context of government surveillance claiming that "the surveillance at issue here involves only *public school* teachers and *public school* authorities." (Brief for the Secretary of Education, p. 37). The government's brief then notes "[s]uch surveillance obviously entails no relationship between the government and religious authorities." *Ibid.*

The government ignores the practicalities resulting from the Title I program being conducted on the premises of parochial schools. Unfortunately, here we are not dealing merely with surveillance of public school teachers by public school authorities. The Federal Government requires that a parochial school in which a Title I program is located provide facilities which are religiously neutral. To be religiously neutral the Title I program must be free from all religious objects, including religious symbols (see Brief for the Secretary of Education, p. 12). Therefore, it is not surprising that from time-to-time administrators of church schools may not kindly accept the regulatory demands that they strip any portion of their facility of religious symbols.[7] Government can run afoul of the Establishment

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[7] Mr. John Schmiedeler, Superintendent of Schools for the Diocese of Kansas City-St. Joseph, testified in *Wamble* v. *Bell*, *supra*, concerning an incident following an inspection of Our Lady of Americas School in connection with the Title I litigation. Following the inspection, the principal of the school was told that she should take the crucifix down from the Title I room. The principal thereupon took the matter to the parochial school board creating sufficient controversy to require the diocesan superintendent of schools to discuss the matter with the bishop. The bishop ultimately ordered the removal of the crucifix. Mr. Schmiedeler, at the *Wamble* trial, testified that "the principal indicated that the pastor and their local school board, which

Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions. . . ." *Lynch* v. *Donnelly*, *supra* at 1366 (O'Connor, J., concurring).

The parochial school student is under the control and supervision and subject to the discipline of the church school during the full time that the student is at the parochial school whether the student is receiving instruction from the church-school teacher or a Title I public employee.[8]

Serious questions may well arise as to who has the authority for the disciplining of students while in the Title I room, whether the rules and regulations apply during the time that a parochial school student is attending classes in a Title I room, whether the Title I teacher may use the principal to discipline a child for transgressions which have occurred during the time the child has been in the Title I room, and whether the Title I teacher should enforce the disciplinary rules of the school. Other examples of possible conflict between the church-school authorities and the Title I public school employees include the potential for scheduling disputes and even the question as to whether a private school student, not attending a parochial school where a Title I program is provided, can be admitted onto the facilities and into the program without enrollment in

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represented the parents, were somewhat aghast at the thought of taking the crucifix down in one of their classrooms." (Schmiedeler testimony, 19 Tr 197-198 (38a-39a), 201 (40a); see also Hagan testimony indicating that the removal of the crucifix was a big decision because it was an object of reverence, 7 Tr 24, 25-26) (10a-13a).

[8] According to the current Federal Project Officer for the United States Department of Education, a principal of a particular school is ultimately responsible for any child enrolled in a private school. However, during the time a child is in a Title I classroom, the child is also subject to the Title I teacher's supervision and control (Williams-Madison testimony, 13 Tr 111) (34a). According to the Federal Project Officer, although the principal may have control over the person of the student when the student is in the Title I room, the parent, by agreeing, to let the child receive Title I instruction, relinquishes, to some degree, some responsibility to the Title I teacher (William-Madison testimony, 13 Tr 117-118) (34a-36a).

the parochial school itself. Excessive entanglement may also occur when a religious institution is granted "access to government . . . not fully shared by nonadherents of the religion." *Ibid.* See *supra*, n.6.

It is evident that State interference with the autonomy of the church, since it controls the site and the providing of remedial services on the premises, is always a matter of concern between a church and the public school authorities. In fact, some churches operating church-schools have refused Title I services simply because they do not want such government intrusion.[9]

In *Lynch* v. *Donnelly*, *supra*, at 1364, this Court referred to *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982), where an important governmental power—a licensing veto authority—had been vested in churches. This Court held that giving such authority to a church was unconstitutional. The Title I program, in essence, grants to churches operating parochial schools veto power over a child's receipt of benefits under Title I. If a parochial school decides that it will not agree to a Title I program on its premises or refuses to remove its religious symbols or otherwise relinquishes a part of its autonomous control over its facilities and its students, it is the needy student who is excluded. A program providing for remedial education to students predicated upon agreement between church and state, therefore permits the student's entitlement to Title I services to be subject to a veto by a church institution.

The majority of this Court in *Lynch* v. *Donnelly*, *supra*, at 1358, noted that "the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.' *Lemon* v. *Kurtzman*, 403 U. S. 602, 614. . . ." Although the Court in *Lemon* also acknowledged that total separation is not possible in an absolute sense this Court has never abandoned its concern, as expressed by Justice O'Connor, that institutional entanglement is an evil with

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[9] Cheatham testimony, 12 Tr 114-122 (24a-31a).

which the Establishment Clause of the First Amendment is concerned. *Id.* at 1366 (O'Connor, J., concurring). Title I programs existent in the various states of the Union daily present the imminent potential of institutional entanglement.

The majority in *Lynch* found no entanglement with reference to the display of the creche noting that in that situation "[t]here is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche." *Id.* at 1364. Unlike the situation existing in *Lynch* v. *Donnelly*, however, there is not only initial contact with church authorities concerning the content or design of the Title I program on the premises but there is daily contact regarding sensitive questions.

V. APPELLANTS' CONTENTION THAT THE CHURCH SCHOOLS IN WHICH TITLE I SERVICES ARE PROVIDED DO NOT DUPLICATE THE "PROFILE" OF *MEEK* v. *PITTENGER* DOES NOT SAVE THE TITLE I PROGRAM FROM ESTABLISHMENT CLAUSE CHALLENGE.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court held that church-affiliated elementary and secondary schools are pervasively religious or sectarian, thus preventing government grants to partially finance teachers of non-religious or secular subjects in such schools because of the entangling surveillance that would be required. Subsequent to *Lemon*, a three-judge court in *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F.Supp. 2933-34 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1973), stated:

> While in some instances it may be that religious values do not affect the content of the secular education provided by these institutions, it is clear that the purpose of such religious-affiliated schools is, in substantial part, to teach and thus advance a given religious faith. The Supreme Court has "long recognized that religious schools pursue two goals, religious instruction and secular education," *Board of Education* v. *Allen*, *supra*, 392 U.S. at 245, 88 S.Ct. at 1927; that, further, "the raison d'etre of parochial schools is the propagation of a religious faith." *Lemon* v.

> *Kurtzman*, *supra*, concurring opinion of Justice Douglas, 403 U.S. at p. 628, 91 S.Ct. at p. 2118. Accordingly, we are satisfied that the nonpublic schools which have participated in the New Jersey Aid to Nonpublic Schools Act are, and will be, for the most part, church-related or religious-affiliated educational institutions.

In *Meek* v. *Pittenger*, *supra*, at 366, this Court cited and took judicial notice of the characteristics of church-affiliated schools, as discussed in Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1680, 1688-1689 (1969), in invalidating the use of public funds for church-affiliated schools.

Nowhere has this Court stated that the answer to ten questions about the nature of an institution determines whether it is pervasively sectarian. It is true that in *Meek*, the Supreme Court referred to the complaint in that action which alleged that the statutory provision under attack was a law respecting the establishment of religion in violation of the First Amendment because it authorized and directed payments to or use of books, materials, and equipment in schools which allegedly had ten specified characteristics. *Id.* at 355-356. One looks in vain in the *Meek* decision or any other decision of this Court for a suggestion that ten characteristics, which the counsel in *Meek* suggested were a profile representation of the schools therein, are the beginning and end of all inquiry on the subject of what is a pervasively sectarian institution.

In *Wolman* v. *Walter*, *supra* at 235-236, this Court made reference to the three-judge lower court decision. Of significance is the district court's decision, 417 F.Supp. 1116, 1117 (S.D. Ohio 1976), wherein the court noted many aspects of the so-called *Meek* profile characteristics were missing. The Court, however, found no difficulty in holding to the *Lemon* finding that church-affiliated elementary and secondary schools are sufficiently religious to invalidate public aid to them in spite of the points of distinction which the district court's opinion in *Wolman* noted.

Clearly, this Court in deciding these sensitive constitutional questions has never felt that it was wedded to a legalistic definition of what is and what is not sectarian. In *Committee*

for Public Education and Religious Liberty v. *Nyquist*, *supra*, at 767-768, this Court stated that the schools "may vary widely from the supposed profile."

It is submitted that there is no logic in the argument that unless a church forces a student to become a member of its faith, it is somehow less sectarian than those institutions which seek to influence religious thought by more subtle and sophisticated means.

In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court indicated its concern for the potential of government entanglement in church institutional affairs.[10] If it

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[10] This Court may take judicial notice of the amicus brief filed by the U.S Catholic Conference in *NLRB* v. *Catholic Bishop of Chicago*, No. 77-752. On p. 1 of their Brief, the United States Catholic Conference states that it is the agency of the Catholic bishops of the United States. On page 2 of their Brief they further stated:

> It is the concern of the USCC that the fulfillment of the mission of the Roman Catholic parochial school system not be interfered with by the jurisdiction of a Federal agency concerned with labor relations over the schools' teachers.
>
> In 1978, 9,202 Catholic elementary and secondary schools served the educational needs of almost three and one-half million students. The Bishops of the United States and the USCC are committed to the belief that Catholic schools fulfill a crucial mission; that is, of providing an educational environment in which children and young people can "experience learning and living fully integrated in the light of faith. . . . Students are instructed in human knowledge and skills, valued in deed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His Creation."

The quoted portion of the preceding paragraph is from the National Conference of Catholic Bishop's pastoral letter of November, 1972, entitled "To Teach as Jesus Did."

On page 11 of its Brief, the Catholic Bishop acknowledged that the Roman Catholic school system in this country is a component of the Roman Catholic Church, stating:

> In the instant situation, the National Labor Relations Board (NLRB) has, *sua sponte* taken upon itself jurisdiction to regulate an activity of a component of the Roman Catholic Church. By virtue of its decision to so extend its jurisdiction, the NLRB has sought to establish a more or less permanent institutional attachment to the sectarian institutions at issue here. The question which such a presence poses is whether or not the institutional integrity of the sectarian institution has been compromised. If it has, then we submit that the government has violated

is constitutionally improper for the government to delve into the religiousness of a school to determine whether the National Labor Relations Board has jurisdiction over the Catholic lay teachers employed by the Roman Catholic elementary and secondary school system, it would seem equally violative for the court to become involved with dissecting the religiousness of elementary and secondary schools to determine entitlement to taxpayer's support.

There is no sta utory limitation in Title I nor any regulatory provision limiting the services provided on-premises to students attending church schools to those schools that are not "pervasively sectarian."[11]

It is respectfully submitted that courts are prohibited by the proscription of the First and Fifth Amendments from dividing church-affiliated elementary and secondary schools into two classes, those that are "too" religious or sectarian, and those

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the First Amendment guarantees of the Free Exercise Clause of the United States Constitution.

And finally, at page 14 of its Brief, the Bishop on behalf of the Roman Catholic Church's parochial school system, states:

> Rather, we are speaking of the vital institutional qualities which go to the very root of the institution, *qua* institution, and mingle inextricably with matters of belief and spiritual orientation. In the instant case, the dispute involves the relationship which is to exist between teacher and employer in a school, a relationship which this Court has repeatedly held to be of signal import to the institutional character of the school. *Meek* v. *Pittmyer [sic]*, 421 U.S. 349 (1925) [sic]. Inevitably, the dispute touches upon the manner of resolving—in the *locus* of authority for resolving—such questions as *who* shall teach in a school and *under what conditions*. But, given the nature, mission, and sponsorship of the schools involved, these are not questions to be resolved by government. For it to presume and act otherwise is a violation of the Free Exercise Clause. The government, through the NLRB, has asserted that it has a determinative role to play in the definition of this relationship. In our view, because the matter involves the integrity of the institution, government does not have such a role, and, equally to the point, the right to say yea or nay with respect to a proposed government intervention of this nature must, under the First Amendment, reside with ecclesiastical authorities.

[11] As far as the United States Department of Education is concerned, Title I services are provided to students attending church schools regardless of the degree of religiousness of those schools (Cheatham testimony, 12 Tr 41-45) (15a-19a).

that are less religious in determining whether public funds or benefits may be provided to church schools under a general federal education aid program.[12]

VI. THE NEW YORK ON-PREMISES PROGRAM IS NOT THE LEAST ENTANGLING ALTERNATIVE AVAILABLE.

The government has attempted to prove the necessity for a on-premises program by reference to a claimed "full investigation" by the Department of Education involving a study in Missouri (Brief for Secretary of Education, p. 10 and n. 9).[13]

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[12] Professor Donald Giannella has observed that a determination of the degree of religiosity would involve the judiciary in the kind of entanglement which the Court has been trying to avoid in First Amendment cases. Professor Giannella also stated that if a highly refined and particularistic test were adopted by the court with reference to the religiosity of the schools some schools and religions would inevitably register plausible complaints of invidious discrimination or lack of equal treatment as the dividing line was etched out case-by-case. Professor Giannella suggested that when judicial decisions turn on such "elusive" and "ephemeral" matters concerning religion, entanglement seems excessive, and equal treatment of religion in schools is seriously endangered. Giannella, "Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement," 1971 The Supreme Court Review 147 at 181.

[13] The validity of this study has been directly attacked in the case of *Wamble* v. *Bell*, *supra*. No decision has yet been rendered in that case, however, one of the issues raised in that case is whether in fact the Commissioner's decisions to invoke the by-pass provisions of 20 U.S.C. § 2740(b) in Missouri were supported by substantial evidence.

On January 22, 1976, after the Missouri study was completed by the United States Department of Education, Arthur L. Mallory, Commissioner of the Department of Elementary and Secondary Education of the State of Missouri, directed a letter to the Honorable T. H. Bell, U.S. Commissioner of Education, in response to the findings of Dr. Bell which were generated by the Missouri report. (See letter from Arthur L. Mallory to T. H. Bell dated January 22, 1976 (1a-9a).

Perhaps more significant was a June 24, 1976, memorandum from Assistant Commissioner John Rodriguez of the United States Office of Education which was directed to Deputy Commissioner Robert Wheeler of the United States Office of Education. In that memorandum Mr. Rodriguez opined that: "the non-public school officials who complained about Title I services in Missouri seemed to base their complaint in part on the assumption that

In *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), this Court seemed to opt for approving the least entangling alternative available when there was a potential for excessive entanglement. In *Walz*, the Court recognized that failing to give tax exemptions could create more entanglement problems than granting an exemption. The Court specifically noted that exemptions restrict the relationship between church and state and tend to complement and reinforce the desired separation insulating each from the other. *Id.* at 676. Here, the least entangling alternative would be a program operated on a completely religiously-neutral site.

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before or after school services are 'inherently' not equitable if public school students receive such services during the school day." Mr. Rodriguez then stated "there is no empirical evidence to substantiate or support this assumption. It is attitudinally derived."

The memorandum from Associate Commissioner Rodriguez further stated:

> There is, however, substantial evidence that a positive correlation exists between the quantity of education and school achievement. From this evidence we can deduce with reasonable justification that before or after school, school services increases the quantity of a student's education and therefore benefits him in excess of what he would receive if services were provided during the school day. It is assumed in this deduction that quality education is being provided. Serious attention should be given this argument. I am willing for the sake of argument in our session on the by-pass report with the Commissioner to take such a position.

(See memorandum dated June 24, 1976, from the desk of the Associate Commissioner reproduced in full and attached at 9a-10a).

The Director of Compensatory Education Wilbert A. Cheatham, the federal official who at the time of trial in *Wamble* v. *Bell* was responsible for Title I nationwide, agreed that there was no empirical evidence to refute Rodriguez's view (Cheatham testimony, 12 Tr 57) (20a). Mr. Cheatham also agreed that there is some substance to Rodriguez's view that private school officials' complaint was attitudinally derived (Cheatham testimony, 12 Tr 59) (21a).

In addition, Mr. Cheatham indicated that there was no comparative study of the results of various types of Title I instructional programs (Cheatham testimony, 12 Tr 132-135) (31a-33a). Nevertheless, 99% of the Title I programs in the country are on-premises during hours programs. However, in the early '70s mobile reading labs were popular. (Cheatham testimony, 12 Tr 93-94) (23a-24a).

The government indicated that the Board of Education considered holding the remedial classes for nonpublic school students in the public schools during school hours, but that this plan was abandoned because of concerns that it would violate the New York Constitution (Brief for the Secretary of Education, p. 9).[14]

In *Wheeler* v. *Barrera*, *supra* at 424, n.20, this Court set forth a listing of possible Title I programs suggested to the Senate Committee which was dealing with Title I legislation. This list included instructional media centers, television and radio instruction, and mobile learning centers. Each of these suggestions would provide a less entangling alternative and a more religiously-neutral arrangement for the providing of Title I services to students attending nonpublic schools. The government has failed to demonstrate why these or other alternatives would not be viable. See also *Wolman* v. *Walter*, *supra* at 247, n.14 for a discussion concerning the use of public centers or mobile units near the nonpublic school premises; also *Wheeler* v. *Barrera*, *supra*, at 425, suggesting the use of neutral sites to replace on-the-premises instruction.

CONCLUSION

In attempting to cope with the day-to-day reality of a similar program, the Rhode Island Federal District Court faced the question squarely and held, "[a] parochial and a public school are not merely sharing in a building; they are sharing the same students. The two schools at best effectuate a partnership, if not for all intents and purposes a complete merger. Extensive contacts between the two facilities and administrations are inevitable as they seek to protect the welfare of their common

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[14] In an illuminating article dealing with the constitutionality of Title I, John W. Calhoun, the Assistant Attorney General in Wisconsin, has suggested that the on-premises program should be scrapped in favor of a dual enrollment program. The author suggests in his article that "a Supreme Court ruling establishing dual enrollment as a constitutional right of students attending nonpublic schools" would facilitate such a solution. Calhoun, "The Elementary and Secondary Education Act and the Establishment Clause," 9 Val. U. L. Rev. 487 (Spring, 1975).

student body. . . ." *Thomas* v. *Schmidt*, 397 F.Supp. 263, 214 (D. R.I. 1975).

A Title I program providing for services administered by public school teachers within the confines of a church-operated school fails both the primary effect test and entanglement test and must be struck down. In order to be faithful to the teachings of this Court, the Title I program for nonpublic school students should be provided at neutral sites. Therefore, the holding of the Court of Appeals should be sustained.

Respectfully submitted,

LEE BOOTHBY
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APPENDIX

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
JEFFERSON CITY, MISSOURI 65101
January 22, 1976

ARTHUR L. MALLORY, COMMISSIONER

Honorable T. H. Bell
U.S. Commissioner of Education
Office of Education
Washington, D.C. 20201

Dear Commissioner Bell:

Thank you for arranging the meeting between members of our staffs in Washington on January 15, 1976, to discuss the Title I, ESEA "by-pass" issue. From the reports received from P. J. Newell and Otis Baker, the meeting provided an excellent opportunity to exchange views concerning regulations and the provisions for a by-pass in the Title I Act.

As you are aware, superintendents representing nonpublic schools met with the State Board of Education on December 8, 1975, and asked the State Board to consider joining with them in approaching your office about a Title I by-pass in Missouri. The State Board asked the staff to study the Title I by-pass provisions and the court cases and make a report to them at their January 18-19, 1976, meeting. The staff made their report to the State Board and, after due consideration, the State Board of Education unanimously agreed to decline to participate in a request for a Title I by-pass and to await the outcome of the court cases now pending before taking any further action.

Missouri has worked hard to make comparable services available to nonpublic schoolchildren. After studying the Act, the regulations and guidelines and the U.S. Supreme Court Opinion in *Barrera* v. *Wheeler*, we developed the *State Plan for the Administration of Title I, ESEA Services to Nonpublic*

Schoolchildren in Missouri (copy enclosed). Judge Collinson, U.S. District Court for the Western District of Missouri, reviewed the State Plan and agreed that it would offer the opportunity for comparable services to nonpublic schoolchildren and so stated in his Order of August 14, 1975, in which he approved the State Plan. (That Order has been appealed to the U.S. Court of Appeals.) The Plan was specifically developed with the following facts in mind:

1. On September 12, 1966, in *Special District of St. Louis County* v. *Wheeler*, the Missouri Supreme Court ruled that (a) sending public schoolteachers paid with public funds into parochial schools was unlawful and invalid, and (b) sending parochial schoolchildren to public schools for part of their regular school day contravenes the state compulsory school attendance law.

2. In its June 10, 1974, Opinion in *Barrera* v. *Wheeler*, the United States Supreme Court stated:

   a. "At the outset, we believe that the Court of Appeals erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri Law. Whatever the case might be if there were no expression of specific congressional intent, Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting federal funds."

   b. "The key issue, namely, whether federal aid is money 'donated to any state fund for public school purposes', within the meaning of the Missouri Constitution, Art. 9, § 5, is purely a question of state and not federal law."

   c. "The correct rule is that the 'federal law' under Title I is to the effect that state law should not be disturbed. If it is determined, ultimately, that the petitioners' position is a correct exposition of Missouri law, Title I requires not that that law be preempted, but rather, that it be accommodated by the use of services not proscribed under state law. The question whether Missouri law prohibits

the use of Title I funds for on-the-premises private school instruction is still unresolved."

Note: The State Board of Education's position was found to be correct by the Circuit Court of Jackson County in *Mallory* v. *Barrera*, September 2, 1975. The Court ruled (a) that funds paid under the provisions of Title I, ESEA, to the State of Missouri are required to be deposited in its State Treasury, are to be appropriated by the General Assembly, are subject to withdrawals according to warrants issued by the State Board of Education, and are to be expended by public school districts in a manner consistent with Missouri's Constitution and school laws, and constitute public funds which are subject to the spending proscriptions of Article I, Section 7; Article III, Sections 36 and 38(a); Article IV, Sections 15 and 28; Article VI, Section 23; and Article IX, Sections 1(a), 2(a), 2(b), 5 and 8 of the Constitution of Missouri and implementing statutes; and, (b) that Missouri law prohibits, and does not permit or require, the sending of public school personnel, paid with funds under the provisions of Title I of the Elementary and Secondary Education Act of 1965, onto the premises of private, sectarian and nonsectarian schools during regular school hours to provide teaching services to private schoolchildren eligible to receive such services under said Act. (This case has been appealed to the Missouri Supreme Court.)

d. "Congress recognized that the needs of educationally deprived children attending nonpublic schools might be different than those of similar children in public schools; it was also recognized that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area . . . Title I was not intended to override these individualized state restrictions. Rather, there was a clear intention that the assistance programs be designed on local levels so as to accommodate the restrictions."

e. "Inasmuch as comparable, and not identical, services are required, the mere fact that public schoolchildren are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical provision for private schoolchildren."

f. "First, the State may approve plans that do not utilize on-the-premises private school Title I instruction, but, nonetheless, still measure up to the requirement of comparability."

g. "In sum, although it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools."

h. "To place on this Court or on any federal court, the responsibility of ruling on the relative merits of various possible Title I programs seriously misreads the clear intent of Congress to leave decisions of that kind to the local and state agencies."

i. "It is clear, however, that the Act places ultimate responsibility and control with the public agency, and the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests."

We feel that the State Plan alluded to earlier, which was approved by Judge Collinson on August 14, 1975, is in compliance both with the letter and the intent of the State Constitution and implementing statutes, Title I, ESEA and its regulations, and the Opinion of the United States Supreme Court in the Barrera Case. In his Order approving the State Plan, Judge Collinson stated with reference to the Supreme Court's Opinion in *Barrera* v. *Wheeler:*

> "The Opinion in several places makes the point that 'comparable' does not mean 'identical' and that the Act itself does not require that identical services be provided in nonpublic schools."

It seems to me that the possibility of a by-pass is focusing on the definitions of or criteria for determining "comparable", "equitable", and "genuine opportunities to participate" with respect to services for nonpublic schoolchildren. In the development of the State Plan, approved by Judge Collinson, our staff and legal counsel gave careful attention to requirements for "comparable" services by reviewing the U.S. Supreme Court Opinion of June 10, 1974, in the *Barrera* v. *Wheeler* case, with special consideration to the following excerpts:

a. " 'Comparable', however, does not mean 'identical', . . . we do not read the Court of Appeals' opinion or, for that matter, the Act itself, as ever requiring that identical services be provided in nonpublic schools."

b. "Footnoted 11—The Act itself does not mention 'comparability'. It requires only that the state agency, in approving a plan, must determine 'that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special education services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.' 20 u.s.c. § 241e(a)(2). The Regulations, 45 CFR §§ 116.19(a) and (b) (1973), are the source of the comparability requirements. See n. 6, supra."

c. "Footnote 6—The regulations state: 'Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation.' 45 CFR § 116.19(a) (1973).

'The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private schoolchildren, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.' 45 CFR § 116.19(b) (1973)."

d. "Footnote 14—HEW's Office of Education refers to the comparability requirement as follows:

'The needs of private schoolchildren in the eligible areas may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public schoolchildren with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project are in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children.' USOE Program Guide No. 44, 4.5 (1968), Handbook, at 41-42. See 45 CFR § 116.18(a)."

e. "Footnote 16—The United States, as *amicus curiae*, states:

'Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private schoolchildren (e.g., prohibition against dual enrollment). Accordingly, Title I programs may be provided in a different manner to private and to public schoolchildren. For example, remedial services for private school students might be provided outside their regular classroom, while being provided in the regular classroom for public school students. In addition, the content of the services could differ if the 'special education needs' required to be met under 20 U.S.C. 241e(a)(1)(A) of the two groups differ (footnote omitted).' "

f. "In sum, although it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools."

We have been hopeful that, among the growing list of United States Supreme Court rulings on the church-state issue as it applies to education, one or more cases could be construed to have general applicability to our own circumstance. Although there are those who disagree, we are convinced that the Opinion of the U.S. Supreme Court, in *Meek* v. *Pittenger*, issued on May 19, 1975, provides the answer to the church-state issue as it relates to Title I, ESEA and should be construed as the controlling case at this time. In *Meek* v. *Pittenger*, the Court ruled on three provisions for public assistance to nonpublic schoolchildren and to nonpublic schools under Pennsylvania statutes. Their constitutionality was challenged under the "establishment clause" of the First Amendment to the United States Constitution. In overturning the "auxiliary services" provision of Pennsylvania Act 194, under which publicly paid personnel were providing remedial and accelerated instruction, guidance counseling and testing services, speech and hearing services to nonpublic schoolchildren during the regular school day on nonpublic school premises, the Court stated:

> "Whether the subject is 'remedial reading', 'advanced reading', or simply 'reading', a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."
>
> "To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed."
>
> "In addition, Act 194, like the statutes considered in *Lemon* v. *Kurtzman*, supra, and *Committee for Public Education and Religious Liberty* v. *Nyquist*, supra, creates a serious potential for divisive conflict over the issue

> of aid to religion—'entanglement in the broader sense of continuing political strife.' "
>
> "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.' "

In his Decree of September 2, 1975, in *Mallory* v. *Barrera*, Missouri Circuit Court Judge Sprinkle declared in his conclusions of law that" . . . the conducting of instructional services by public schoolteachers on parochial school premises necessarily requires continuing and excessive entanglement which is impermissible under the Establishment Clause of the First Amendment. *Meek* v. *Pittenger*, 95 S.Ct. 1753 (May 19, 1975), Slip Opinion, at 17-22."

In addition to the clear implications of *Meek* v. *Pittenger*, in the U.S. District Court's Order issued on August 14, 1975, the Judge stated it was the belief of that Court that sending public schoolteachers into private schools during regular school hours would be in direct violation of the prohibitions of the First Amendment of the U.S. Constitution.

According to an article in the January 21, 1976, edition of The Kansas City Star (copy enclosed), it would appear that representatives of nonpublic schools will request you to consider the by-pass in some or all of the local educational agencies serving nonpublic schoolchildren through their Title I programs. While we believe that comparable services are being provided under the present State Plan in Supreme Court Opinion in *Barrera* v. *Wheeler*, I understand that some of your people may not agree and you may decide to exercise your authority to implement by-pass procedures in Missouri. In such case, the affected local school districts and the State Board of Education will be concerned about the amount withheld from each affected district's Title I allocation to provide services to nonpublic schoolchildren. We believe the amount to be withheld from a district's Title I allocation should be determined on a numerical proration basis.

Our concern about the amount of funds withheld results from our experience with the by-pass under Title III, ESEA. Since the allocation under Title III is on a state basis, the excessive withholding has not so directly affected individual children within a local educational agency. Excessive withholding under Title I, however, would be detrimental to educationally deprived public schoolchildren in the affected school districts and would result in discrimination against such children.

Ted, this has been a long letter, but I felt it necessary to set forth what we believe to be persuasive arguments for the position we have taken in the administration of Title I, ESEA services to nonpublic schoolchildren in Missouri. There is doubt in the thinking of some people that the issue of public services for nonpublic schoolchildren has been settled by the courts, but, personally, I believe it has been settled by the U.S. Supreme Court in *Barrera* v. *Wheeler* and *Meek* v. *Pittenger* and by the Missouri courts in *Special School District* v. *Wheeler* and *Mallory* v. *Barrera*. I do not believe that we should attempt to do by indirect means that which we cannot do by direct means.

Respectfully yours,

Commissioner

Enclosures

COMPENSATORY EDUCATIONAL PROGRAMS

FROM THE DESK OF

the Associate Commissioner

June 24, 1976

NOTE TO BOB WHEELER

The non-public school officials who complained about Title I services in Missouri seem to base their complaint in part on the assumption that before or after school services are "inherent-

ly" not equitable if public school students receive such services during the school day. There is no empirical evidence to substantiate or support this assumption. It is attitudinally derived.

There is, however, substantial evidence that a positive correlation exists between the quantity of education and school achievement. From this evidence we can deduce with reasonable justification that before or after school, school services increases the quantity of a student's education and therefore benefits him in excess of what he would receive if services were provided during the school day. It is assumed in this deduction that quality education is being provided. Serious attention should be given this argument. I am willing for the sake of argument in our session on the by-pass report with the Commissioner to take such a position.

/s/ JOHN

[24]

A. Yes.

Q. And who was that?

A. Pete Cole.

Q. Did he ever visit you and your school before Dr. Wamble's visit? I am talking about during the time that the Title I program was operational in your school and being conducted by Blue Hills.

A. Yes.

Q. Do you recall him ever discussing the crucifix, and the presence of it, in the room?

A. No.

Q. Did anyone from Blue Hills Homes Corporation, before Dr. Wamble's visit, ever ask you to remove the crucifix from the room?

A. I don't recall that they did.

Q. All right. You have indicated that Dr. Wamble did visit the room. Did anything occur with reference to the presence of the crucifix after Dr. Wamble's visit?

A. Yes.

Q. And what did occur?

A. The crucifix was removed.

Q. Now, can you tell me what discussions occurred with reference to that? In other words, who contacted you first about the removal of the crucifix?

A. I don't recall if it was Mr. John Schmiedeler or whether [25] Blue Hills did. I don't recall which one did.

Q. In any event, somebody contacted you?

A. Yes.

Q. Did both of those individuals talk to you about it?

A. I don't recall.

Q. And who removed the crucifix?

A. That I am not positive either, whether Mr. Schmiedeler did or someone else from his office. I don't recall exactly who did it.

I think in my deposition I said Mr. Schmiedeler did, but then I talked to several people about that afterwards, and I am not sure.

Q. I appreciate that. Did you ever speak with the administrator of the school with reference to the crucifix?

A. Yes.

Q. And what occasioned that discussion?

A. Pardon me?

Q. What occasioned that discussion? What brought that about?

A. The fact that I was told to take it down.

Q. Can you tell me whether the administrator brought the matter up to you, or did you bring it up with the administrator?

A. Most probably I brought it up to him.

Q. And what was the purpose of your discussing it with the administrator?

[26]

A. At that time we also had a school board, and any big decision I would always discuss with both of them.

Q. And did you take this matter to both the administrator and the school board?

A. Yes.

Q. Did you consider it to be a big decision?

A. Yes, I did.

Q. You consider a crucifix to be a sacred object?

A. Yes.

Q. And what do you understand, at least your opinion, based upon your experience, the significance of that religious object to be?

A. The significance would be that our school is a Catholic school, and it was an object of reverence we had in our classrooms.

Q. Did the other rooms in your school also have a similar religious object somewhere in the room?

A. Yes.

Q. And was it generally placed in the same location?

A. Generally so.

Q. Did you ever receive any kind of written communication from anyone from Blue Hills concerning the presence of religious objects in the Title I room?

A. Yes. I am not sure if it came from Blue Hills or from the school office, diocesan school office.

* * *

[149]

Q. In any event, it hasn't made any particular impression on you?

A. If I don't recall it, I guess you would have to draw that conclusion.

Q. You have some fourteen thousand what, these are school districts?

A. Local school districts that participate in Title I.

Q. How many of these local school districts did your monitoring team get around to observe?

A. Oh, in a year?

Q. In a year.

A. Less than one percent, my staff.

Q. And we are talking about one percent of the fourteen thousand districts—

A. For a given year.

Q. For a given year. And there are, I assume, usually many schools within the school district?

A. That's right.

Q. So we are talking about a very small fraction of the schools that your monitoring team would ever go in and see?

A. That's right. We also, however, receive reports from [150] state agency monitoring teams that have been required to review each school district on the three-year basis generally, every three years they have to visit the school.

Q. They would give you reports, I would assume, in the event they find any violation of the regulations and guidelines and requirements of the federal government?

A. Yes.

Q. But you don't have any regulations or requirements with guidelines with reference to a religiously neutral setting, do you?

A. We have guidelines on public control. No, I believe I have answered that.

Q. How would you get any monitoring reports or even be apprised, based on what you get back from the state, as to their problems they might perceive with reference to the—

A. I am not sure we have ever defined religiously neutral setting.

Q. You know that is in the current contract that is in existence between the Blue Hills Homes Corporation and the federal government.

A. I can't tell you that I know all of what is in those contracts. No, I did not know that language was in there, specifically. I know that that is generally what we expect, that it be a religiously neutral setting. And that [151] is what we find generally. But, you know, when a room looks too much like a chapel, I mean—I don't know of a list of things that you look for.

Q. Let me ask you this because you put your finger right on it, you don't know when it finally reaches that level, do you?

A. No. I don't know.

Q. It would require somebody on the site to make that judgment?

A. That's right.

Q. Did you ever visit Puerto Rico while you were in charge of the northeast region?

A. Yes.

Q. Did you ever go into the non-public school, Title I rooms there?

A. Yes.

MR. NESLER: Objection. This line of questioning is totally irrelevant.

MR. BOOTHBY: I will withdraw the question.

THE COURT: It is withdrawn.

Do you feel you are drawing reasonably close to the end of your examination?

MR. BOOTHBY: I am always reasonably close. This would be an appropriate time.

THE COURT: Let's take our afternoon break and

* * *

[41]

Q. (By Mr. Boothby) Generally speaking.

A. That's my understanding, generally.

Q. Do you ever make a determination, in providing this service, what was going on in the rest of the school room is of a sectarian character, and you go into the degree of religiosity?

A. No. When we go into a school operated by the Lutherans, Catholics, or anyone else, we know it's a school that includes the teaching of religion. That's no surprise. We would be surprised if they didn't teach it.

What we go into—and we generally go to a principal's office and we go to a Title I classroom, or a facility. They put them in different places. Most of the time we are

talking about a Title I classroom. That's really what we pay attention to.

Q. Let me ask you this question. If it was brought to your attention—I am talking about your application of the statute and your regulations—if it was brought to your attention that the Title I program was being conducted within a school, in a room within a school made available by the school, where you learned that the school was controlled by churches or religious organizations, had as their purpose the teaching, the promulgation and promotion [42] of a particular religious nature, conducted their operations, curriculums and programs to fulfill that purpose, they impose religious restrictions on admissions; the required attendance at instructions in theology and religious doctrine; they required attendance or participation in religious worship. And you were told by them that their whole operation was an intregal part of the religious sponsor of the mission. They have as their substantial purpose the inculcation of religious values. They impose religious restrictions on faculty appointments. And they impose religious restrictions on what the faculty may teach.

If you were told all of those things were present in that school, it was admitted, would there be anything in your Title I requirements, your regulations, as you apply it, that would cause you to say we cannot provide the Title I services in a Title I room in that school?

MR. NESLER: Objection to the form of the question, Your Honor. Also object to the question. It's a hypothetical and there is no evidence of any of the schools in Missouri in which Title I services are offered has any or all of those characteristics.

THE COURT: Overruled.

A. Mr. Boothby, we don't get a review of all of that. However, there was one thing where you said the students, all the [43] students had to be a member of a certain religious faith.

Q. (By Mr. Boothby) I said there were restrictions.

A. Oh, restrictions. In other words, 60 percent of the enrollment had to be Lutheran or Catholic, or something like that; is that what you mean by restrictions?

Q. Or it could be that they would give preference.

A. Your specific question related to all of that, is there anything in the regulations that say that is a violation?

Q. Anything that would cause you to withhold providing Title I services to the students at that school within the Title I room, within the abdomen of the school?

A. Mr. Boothby, that was such a long list of things you read. I would just generally respond that I can't think of anything that would specifically violate a private school, non-public school, that happens to be operated by a religious group. The understanding is that they teach that religion. How much they teach it, how forcefully they teach it, does not become an issue unless the federal funds are involved in the teaching of that religion.

If we go into a classroom and find Title I inventories stamped in religious books, we have got a problem. And we would cite them for such a problem.

If we went in a room and a Title I teacher was teaching children how to say their prayers, we would view that as a violation.

[44] And I have been in hundreds of classrooms, and probably thousands, and in private schools, I would say certainly hundreds. And the problems we have had almost always related to whether or not the child resided in the appropriate attendance area in order to be considered in Title I. It was not an issue of whether they were teaching Bible, or whether—I mean, all of those, the religious issues.

I have never been in a classroom where I saw a crucifix or an image. I just never have. And I have been to a lot,

hundreds of classrooms. And as I said, I have had reports of that to me by members of my staff, but I must tell you, that has been my experience.

Q. So there is no question that you don't say that there is a certain class of schools, because of their being too religious in character, they cannot be a site where you provide the services?

A. If we went into a Catholic school, for instance, we would look for things. We would not necessarily look for something in a so-called Montessori school. There are a lot of private schools called the Montessori approach. Generally, they are not in low-income areas. But if they were, we would tend to look for different kinds of things and to inquire about different issues. But because the school teaches religion and serves more people of one [45] religion than another, I don't know that we have ever gotten into that.

Q. Now, you brought up something. How do you monitor a situation where a person of the same religious persuasion is teaching in a Title I room in a school of the same persuasion as that particular teacher? How do you monitor what the discussions are in that particular classroom, Title I classroom? I am not asking you to tell me what goes on, but I want you to tell me how you monitor what goes on.

A. We monitor what goes on, not by a review, word-for-word of activities, but a review of materials, a review of the objectives for the program, whether or not the objectives are being implemented.

We review the individualized program folders. We have learned since the early '70s, a disadvantaged child needs an individually prescribed program to be implemented to be the most effective program. We look at that. And again, they are using SRA materials, which is something that we see quite often. We review those materials. We are pretty familiar with them, but we don't monitor every

example that a teacher gives to a student to determine whether or not it's religious, whether it's in a public school or non-public school.

Q. Let's not talk about material. Let's talk about discussions. [46] Is there any way you can monitor discussions?

A. Only when we are present.

Q. And you have indicated you have 14,000 school districts to monitor?

A. That's right.

Q. And how big a staff do you have to monitor?

A. Oh, our staff ranges from 70 to 125, depending on the circumstances, in terms of administrative, salaries and expenses available.

Q. Let me explore something with you. Did you have any elementary and secondary training in a public school?

A. In a public school, no.

Q. All in a private school?

A. That's right.

Q. A church-operated school?

A. That's right.

MR. NESLER: Objection to the relevance of this to anything concerning Title I in Missouri. I don't believe Mr. Cheatham's educational background, where he went to grade school or high school has any bearing on the issues in this case.

THE COURT: On the contrary, I think it's quite relevant. I am going to overrule the objection.

Q. (By Mr. Boothby) Were the schools that you attended, schools where religion was taught in more than just the

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[57] opinion that you did as to the benefit of an after-hours program.

A. Yes, that's what it indicates. He had a different opinion.

Q. You notice in this statement that he indicated in a notation to the Commissioner, to Bob Wheeler, "The non-public school officials who complained about Title I services in Missouri seem to base their complaint, in part, on the assumption that before or after-school services are inherently not equitable if public school students receive such services during the school day. There is no empirical evidence to substantiate or support this assumption."

Do you know of empirical evidence to refute that?

A. No. Really, this whole issue he is discussing really is why we went on site and conducted the investigation, because we couldn't sit back in Washington and make a decision they were out of compliance because they had after-school programs.

Q. I agree with you, but did you, in your search, attempt to locate empirical evidence from the standpoint of data, hard data, to refute what Dr. Rodriquez said in this memorandum?

A. Well, no. All I can tell you is that in all of our discussions with qualified educators, none of them—you had qualified people as your superintendents, as your assistant superintendents, people with doctorate degrees [58] in education, none of them recommended an after-school program. None of them said they would have considered it for the public school children for a number of reasons. And I know of no study that shows that after-hour programs are as effective or more effective than regular hour programs, especially for disadvantaged children.

Q. You notice in the next paragraph he states, "There is substantial evidence that a positive correlation exists between the quantity of education and school achievement." Then he deduces from that that the additional time would be beneficial.

A. Mr. Rodriquez, I consider him a friend, but he doesn't support his statements. He is making statements, he doesn't support them. He doesn't footnote them. He doesn't refer to any studies. He had a problem with this whole issue.

Q. Just one question and I am through. When he made this statement, had he seen your on-site investigation?

A. I really do not know. He certainly was in the meetings when we planned it, June 24, 1976, I doubt we had a first draft of the results.

Q. He was aware of your findings?

A. By then, we would have discussed certainly what we had found, what we had seen.

Whether or not he was in those meetings or off involved in other activities, I just don't recall.

[59] MR. BOOTHBY: I will pass the witness.

THE COURT: Before you examine, Mr. Nesler, Mr. Cheatham, Mr. Rodriquez makes a statement in Exhibit 977, in the first paragraph that, "The Assumption that before or after-school services are inherently not equitable if public school students receive such services during the school day is attitudinally derived." Do you agree with that?

THE WITNESS: Your Honor, the attitudinally derived, I think there is some substance to that statement. And I am not trying to be evasive. I am just saying that we were not dealing with the inherently. We went out to determine whether it was or wasn't. I must say that there is generally a negative response in the educational community to extended hours for school programs, especially for the disadvantaged. That has been my experience.

THE COURT: Now, is it critical to that attitude toward this kind of a program, that other students, be they public

school or other private school students, I don't care in this context, be receiving such services during the school day?

THE WITNESS: Your Honor, I believe that it's at the comparable opportunity to participate.

I believe I said if all of the children had to [60] jump over the same hurdles, as it were, to get their services, there would have been a lot less question than if just this particular group of children were treated one way and another group treated another way.

THE COURT: Of course, the statutory language is equitable, not comparable, isn't it?

THE WITNESS: Yes.

THE COURT: We have been dealing with comparable right along.

THE WITNESS: But equitable, whether or not it is equal, I see that word as meaning equal treatment. Are the facilities, the materials, approximately the same quality? Are teachers trained in approximately the same way? They don't have to be the same.

I think we stress in a number of our publications, they don't have to be the same, but within a reasonable range of the other.

THE COURT: We may return to this. Mr. Nesler, do you want to examine on Redirect?

MR. NESLER: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. NESLER:

Q. Mr. Cheatham, I would just like to ask you a few questions about your cross-examination this morning before we return to events of yesterday.

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[93]

MR. BOOTHBY: During what time period?

MR. NESLER: During the time period prior to the bypass.

A. Well, I can't remember Missouri saying a lot during those sessions. Mr. Baker is quite a strong leader in his office and strong spokesman for that office.

I remember specifically at one conference where Mr. Baker addressed kinds of services that we were suggesting as appropriate as, in his view, not appropriate.

Q. Why did he say they weren't appropriate?

A. Because they were delivered on private school premises during the regular school hours.

Q. That would be the basic type of service you were referring to, or suggesting?

A. In 99 percent of the programs, that would be a part of the appropriate description of the services to non-public school children, would be on premises during the regular school day, whether it was in a mobile van parked on the premises or temporary classroom, or in the building.

Q. Are you saying that is how everybody else did it?

A. Yes, with very few exceptions. In small towns, it's not unusual for students to all go to one school during the day to receive services because of small groups, or for a teacher to travel—for awhile we were giving a lot of business to people with the mobile reading labs in the [94] early '70s. They would just drive them around. The children would come out and stay in the lab for 45 minutes, receive their services and go back in the non-public schools. But today, most of the services are provided on premises.

Of the 14,000 school districts, most of them, Your Honor, are small; probably people go in for an hour or two during the day and then leave, provide services. They are not there all day.

THE COURT: Is Missouri the only state in the Union which has, or at least is enforcing Constitution or statutory law which prohibits that kind of a program for Constitutional purposes?

THE WITNESS: I believe it has the strongest enforcement. We have some real problems in the state of Virginia, but I don't believe our bypass program in Virginia is as broad. I think in terms of what local school districts do in Virginia is a little spotty. I don't believe, for instance, that the state agency would disapprove a project—I am getting into an area I am not that familiar with, in terms of Virginia. Certainly the situation in Missouri is different than any other state.

THE COURT: In stating the question, I should have said statutory Constitutional law, which it is intended,

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[114]

Going to something you suggested either yesterday or before, my view is that we are not overly aggressive in this area. We did provide guidance in this handbook, I believe, in the early '70s because we wanted to assist state and local in getting more children in the program. But I can't tell you whether we are nationally missing 50 percent of the children or 10 percent of the children that ought to be in this program.

Q. I am concerned about one statement you made while you were testifying. Did I understand you to say that if the non-public schools didn't elect to participate, perhaps you would find that there was no violation in failing to supply the services to non-public school students?

A. Sure. Most of the Seventh Day Adventist schools elect not to participate. We don't hold the local school districts in violation.

Q. You picked the Seventh Day Adventist. What if a Seventh Day Adventist disadvantaged child, ranging at the 10th

percentile, desires to receive Title I services, is in the target area, tenth percentile, he is in the state of Missouri; his parents want to send him to a Seventh Day Adventist School; he is attending a Seventh Day Adventist school. They have religious reasons for sending the child there. He can't get Title I services in the public school, [115] can he?

A. Not in Missouri.

Q. How would he get it from the Catholic or Lutheran school?

A. Oh, that's a hypothetical. I would think some arrangements could be made for that. We are talking about one student. I don't think the Department would get terribly upset if that one student was transported, if the parents wanted, over to the remedial reading program at the Lutheran or Catholic school.

Q. What if the parents don't want him in that situation?

A. Mr. Boothby, based on the appropriation from Congress, we are missing half of the children, one-half. We don't guarantee services to every child.

The local would be told to counsel with those parents to see if there was a way to work it out. But in many communities, students both in public schools and private schools are not being served. In all communities, no more than half of the children should be served. I am talking about nationally. But when you look at the appropriation from Congress, Congress figures they are putting money out in accordance with about 50 percent of the needs.

Maybe that Seventh Day Adventist would miss out. That would not be, per se, a violation.

Q. Are we serving the school or are we serving the child?

[116]

A. Serving the child. I think that is one thing that is very unique about Title I, is that we are not talking about a program where you are building buildings and refurbish-

ing buildings, and buying a lot of equipment and leaving it in schools. You are talking about a program that is oriented services toward children. If the services are discontinued, the equipment is withdrawn.

Q. But under the bypass arrangement in Missouri, as I understand it, if a school decides that they don't want to have the federal government's people coming in and teaching remedial reading to their students, if they decide that, then the child cannot receive Title I services?

A. Under the bypass, the only way that I know that we would deliver services under the bypass would be in the non-public school, or in cooperation with the non-public school.

If that school principal said, I don't want to participate, then the children would lose their services. Is that your point?

Q. That's my question.

A. That's right. We don't force, under the bypass, private schools to participate.

Q. But if a private school decides to participate and they have, I think in Missouri, you have to have 10 or 12 students, then the program is effective and the students in that school that are eligible, they receive the service?

[117]

A. That's right.

Q. I represent to you that Mr. Baker, Otis Baker, when he was testifying, said he would service under the public school arrangement, one child, whether they were going to a Baptist school, an Adventist school, or the public school.

Do you take that into consideration when you decide whether the bypass arrangement is the best way to service all disadvantaged children that are eligible?

A. My statement is that if Mr. Baker has enough money in Missouri to serve every eligible child everywhere, includ-

ing the non-public schools, then I think Congress would want to take a look at the formula for Missouri. He can't have enough money to do that and design a program that has size, scope and quality. I mean, the terms "size," "scope," and "quality," also apply to any program.

That's why we say, providing a movie projector is not a program; that the program involves more than materials. It involves a visit once in awhile from a social worker.

So if Mr. Baker made that commitment, my experience is, he would have a very difficult time, other than just watering down the program statewide, in delivering on that.

I would also suggest that that probably would not be appropriate unless he is serving every child in [118] the public school. And my understanding is, in every state, every child in the public school is not being serviced. I think if we look back at our report, we would show on page after page, there are 695 children in Jefferson City eligible. They only intend to serve 145. That's the routine.

Q. I am talking within the criteria.

A. This is within the criteria, educationally deprived, below the fortieth percentile is what that means, in Missouri, 695; how many were participating, 145.

Q. I don't want to misrepresent. I mean, within the criteria established within each LEA, in other words, it might be the thirty-fifth percentile within that LEA.

A. Yes. One way to reduce the number—frankly, as far as the federal government is concerned, any child below the fiftieth percentile is eligible, below grade level. But my experience with the program is that it's impossible to service all the children. And it may not be reasonable to track around servicing one child. That's generally not what we do. I am not saying in some small communities that we don't service one child at a school, but that is the exception to the rule. Generally, we don't.

Q. Can you tell me what the justification is for permitting an arrangement to exist—when this is supposed to be for the benefit of children—to have the church-operated [119] school where the child is attending, determine the participation, the benefits, the governmental benefits, which a child will receive?

A. The church deciding governmental benefits?

Q. In essence.

A. Private schools, Mr. Boothby, you are familiar with them. They have all sorts of rules. Some say you can smoke and others say you can't. The parents know what the rules are when their children enroll in those schools. And I believe that the average Seventh Day Adventist parent knows if their child enrolls in a Seventh Day Adventist school, they are not likely to participate in any federal program. That's traditional, at least at elementary and secondary.

THE COURT: He knows there is an amendment to the Constitution of the United States which prescribes establishment of religion, or entanglement of the government in religious activity, and that is true of parents who enroll children in Adventist schools, or Catholic schools, or Lutheran schools.

THE WITNESS: I think the average parent knows that, Your Honor, yes.

THE COURT: Now, in making the decision whether there are equitable services provided, is that fact fed into your equation?

THE WITNESS: The Constitutional question?

[120]

THE COURT: The awareness of parents of the difference of their children from the other children by making the decision to send them to religiously-oriented schools.

THE WITNESS: I can't tell you how we factor that in. Different religions deal with federal programs differently.

Some religious groups, assistance at higher education, seems to be okay. Elementary and secondary, it's not okay.

I am really not that familiar with how that is determined, and I would think that the average parent probably isn't that clear on it. But I really don't have any information on that.

THE COURT: Thank you.

Q. (By Mr. Boothby) Let me ask you this. Would you accept the proposition, based upon your experience, not only in the Department of Education, but the Department of Civil Rights, HEW, that every citizen in this country is entitled to equal access to governmental benefits that he is statutorily qualified to receive, irrespective of his beliefs and practices?

MR. NESLER: Objection, Your Honor. I believe that calls for a legal conclusion on the part of the witness that he is not competent to give.

[121]

THE COURT: It certainly calls for something of a conclusion on his part, but I think considering the critical role he plays in the administration of this program, that it might be of interest to us to know what his views are.

A. Your Honor, I just have difficulty with that question knowing that there are all sorts of services that the government makes provisions for, but then they don't fully fund them. The government knows in the beginning, some people are going to get it and some people aren't. And that's the case in Title I and always has been.

From that vantage point, I don't know how to answer that. I think so many things come into play. Is it discrimination when the government doesn't fully fund a program? It makes it impossible for everybody to receive the services that the government acknowledges are needed.

Q. (By Mr. Boothby) Let me ask you one question and then I will drop it and get to a couple other things. Based on your experience, you have mentioned about Adventist schools.

A. Yes.

Q. Do you have experience that the so-called Christian schools, are you familiar with the Christian schools as a movement?

A. Yes.

Q. Do they always resist the government coming into their schools?

[122]

A. Some do and some don't.

Q. So to the extent that they do, there would be a similar problem there?

A. That's right.

THE COURT: One question on that. Do you have Title I programs in Christian-evangelical, or evangelical-Christian schools?

THE WITNESS: Yes. It is different in different areas. I think probably not information that is not available to probably some of the hierarchy of the Seventh Day Adventists. I have been to some towns where the Seventh Day Adventist schools are participating and it seems to be kind of a local determination. But in some parts of the country you find Christian schools, you find Lutheran schools, you find non-denominational schools.

You go to the next state and you wouldn't find anything but Roman Catholic schools participating.

THE COURT: All right. Thank you. Go ahead.

Q. (By Mr. Boothby) You discussed a little bit about this equitable basis, or we have talked in terms of comparable services. We have used varying terms.

In any event, you have mentioned that that really means, at least size, scope, quality and opportunity to participate as I understand it.

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[132] is the section beginning on page 30, item D. I believe that's a summary of what the principals said about the program that is being offered.

MR. BOOTHBY: I can't tell from the paragraph. Perhaps the witness can answer that.

A. This is the information as they reported it to us under that Section D. This is not a statement attempting to summarize on behalf of the government, a conclusion. We were reporting findings. We summarized findings at the beginning. We really didn't report conclusions and recommendations and next steps in this report. But this is a rundown of what various people told us.

Q. As far as the Catholic principals are concerned, though, in essence, they told you the essential differences had to do with the hours?

A. Yes, that's what generated the most concern, and then there was the fall-out from that.

MR. BOOTHBY: I have nothing further, Your Honor.

THE COURT: Mr. Nesler?

MR. NESLER: Perhaps the Court has some questions.

THE COURT: Yes, I might. Thank you.

I keep returning to this, Mr. Cheatham, and maybe it is because I don't understand what you have already said, probably more than once; but as I recall your testimony, there was a period of time prior to 1975 [133] when Missouri provided equipment only.

THE WITNESS: Yes.

THE COURT: And that was for a period of about two years, right?

THE WITNESS: That's my understanding.

THE COURT: Now, during or after that two-year period, was there ever conducted any comparative assessment of the results of the public school, vis-a-vis the public school programs in Missouri at that time?

THE WITNESS: Pre- and post-test evaluation?

THE COURT:The Court: Right.

THE WITNESS: I am sure the State of Missouri provided evaluation reports for each year. Evaluation reports are something that states provide copies of to the federal government. But until the late '70s, there was no national evaluation; it was a state-by-state. But I would be very surprised if Missouri did not have an annual evaluation report, which would include some information on those programs.

THE COURT: If you were, as an administrator, making the assessment as to the relative equality of services being offered one segment of the population as opposed to another, and your money figures were roughly, your fiscal figures were not the same, but [134] comparable—I wanted to avoid that word—but the bottom line was that, as a matter of fact, both groups were performing or improving their performance at an almost identical rate. Now, also, one group was there at different times of the day, or their parents had to go get them and take them at an inconvenient time and all that sort of thing. The fact is, they got the goods and they were performing well. Now, how would you evaluate, then, those two programs? Would they be comparable programs, equal programs?

THE WITNESS: If the results were comparable, would the programs be determined to be comparable if the input was not comparable? No, I believe our focus would be on the input part. The results we would be interested in, but

we really don't have as firm a handle. For instance, there are those who say you shouldn't fund the unsuccessful programs after one year. If they are not successful, don't give them any more money.

The program is a formula grant. The money is generated by the Congress every year, and while we have models for good programs and we say that you can't waste the money, we have never made hard compliance determination based on results, that [135] California is going to continue to get its money because it is effective; Texas isn't going to get its money because they are not as effective. Under the latest regulation, we can ask very few questions about results. It is determined to be more of a local and state matter and federal concern. So we have kind of been back and forth on that.

In the late '70s, we got our hands into this result. We had national evaluation; we had three national models. We could compare what was happening in Missouri to what was happening in Arkansas for the first time. But the recent amendments have gotten us out of that, unless the states voluntarily do that. So we really haven't been that tight on results, Your Honor. It's just, we haven't been allowed to have that kind of control.

THE COURT: I think you have said this, but I want to make sure this record is clear for our purposes. In your ongoing difficulty with the State of Missouri—and I appreciate the fact that you have had quite a bit of it—but as an administrator and the years that you're in the program, in and out of the program and back into it, did you understand that the Missouri Department of Education entertained the view that compliance with your Department's requirement

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[111] presence and intervention at that point.

THE COURT: Okay.

Q. (By Mr. Boothby) Let me represent to you in this case there is testimony, in more than one case, that at least in one that I can think of, where the Title I teacher sent a discipline problem to the principal's room and the principal administered punishment, is that in accordance with your policy and instruction to your Title I people?

A. I told you I wasn't aware of such a situation. But that kid is enrolled primarily in that private school. And that principal is ultimately responsible for that kid.

Q. Let me ask you this, during the time that a student is in the Title I room, from your standpoint, is it your opinion that that student is still under the ultimate control and supervision of the authorities of the private school?

A. I think at that point where the kid is in the Title I room for Title I instruction, the kid is under the supervision and control of the Title I teacher at that point.

I think the discussion we have just entered into, if all else fails and the kid goes to principal's office I don't know that I would get terribly upset about that.

Q. I will represent to you that there is in the record in this case in evidentiary testimony, a statement of a

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[117] MR. BOOTHBY: Since we have an objection, I am wondering whether I should ask a new question or have that previous one asked, whichever way the Court wishes.

THE COURT: The witness has now had the opportunity to examine part of the deposition you asked about. Now, do you have, that having happened, Mr. Nesler, do you continue to object to the question?

MR. NESLER: No, Your Honor.

THE COURT: You may answer the question.

THE WITNESS: What was your question?

THE COURT: Would you read it back, please? (Whereupon, the court reporter read the pending question.)

"I will represent to you that there is in the record in this case in evidentiary testimony, a statement of a principal of a Catholic school that any time a student is on the premises, regardless whether the student is in the Title I room or outside the Title I room, the administration of that Catholic school has not only the duty but the responsibility of assuming control of that child, would you agree with that statement?"

A. When a child receives Title I instruction—before a child receives Title I instruction, Your Honor, a letter goes home to the parents, requesting the parents' permission for the participation of that student in a Title I program. And the parent signs a consent form and sends [118] it back to the Title I teacher. Those are kept on file. So a student does not receive Title I instruction without consent of the parents.

So I think in a degree the parent is relinquishing some responsibility from the private school to the Title I teacher.

Q. I want to ask you a very interesting question that just occurred to me. In the State of Missouri there is a requirement, as I understand it, of six hours of required time under the Compulsory Education Act. Is it your position that the time this student is in the remedial program, that child is not in that private school?

MR. NESLER: Objection, Your Honor. There is nothing in the record to indicate that requirement is applicable to private schools. I don't believe there is any evidence in the record.

THE COURT: There is if their degrees and diplomas are qualified. I can take notice of that.

You are asking if the Title I time is used to qualify private schools?

MR. BOOTHBY: My question really boils down to, when a child is in the Title I program, in your opinion, is he actually in school under the Compulsory School Attendance Law?

MR. NESLER: I think that requires a legal

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[65] neutral. We did perform that function during the audit at the schools we visited.

Q. Was there anything that you were given or was made available to you by anyone in authority that told you what the guidelines, the criteria, any statutory requirement indicating what you were to look for in determining the matter of religious neutrality?

A. No. In fact, the only reference to religious neutrality we could find—we could not find them in the regulations themselves that dealt with Title I or the By-Pass.

The only reference to religious neutrality was in the program agreement between Blue Hills and the Department of Education program representatives. There was a stipulation and provision in the negotiated agreement between the two they would administer the program in a religiously-neutral setting.

We have not been able to find that in the regulations in the Title I statutes. There is a provision that under the By-Pass, that the teachers are not under the supervision of the schools. But there is nothing else we see in the regulations that talk about religious neutrality or tell us what that means.

Q. Okay. So when you performed this part of your responsibilities, tell me what you did.

A. Well, we, Jan Keeney and I, tried to think what do they [66] mean by religious neutrality. And we came to the conclusion evidently what they are meaning is the fact they are not providing the class with various religious articles; they are not saying mass in the same room they are giving Title I. There are not altars, this sort of thing.

And I believe in my deposition to you I couldn't recall the fact that we did do that. But I went back to the workpapers and we had, in fact, and we did find some problems on religious neutrality. They are not in the report. And I can tell you exactly what we found.

We found in the St. Louis LEA in two schools we looked at in St. Louis, for two classrooms we found a crucifix on the wall in one classroom and in another class room—it was held in the library, I believe it was—there was a religious picture on the wall.

In another LEA, I believe Jefferson City, we found a classroom where there was an altar that was covered up with some kind of cover over it, that kept it out. And we felt that was not a problem.

Q. Was or was not?

A. Was not a problem. They had it covered up. It was an altar but they had it covered.

We did present this to Pete Cole during our exit conference, the fact we found articles in rooms, this was a violation of your agreement with the Department [67] of Education. In writing my report, however, I felt that it to be not significant. And I, therefore, made the decision and talked to my Regional Inspector General. And we decided to omit it from the report since we had discussed it with Pete Cole and evidently they were going to make corrections to it.

Q. Let me ask you, I realize that you have a lot of data you have to try to remember and maybe don't know the answer to this. Can you tell me, as best you recall, what

schools you found these various either what you felt was perhaps a violation of the understanding or in the one case it was the covered altar.

A. Two weeks ago I had those two schools memorized. And for the life of me I can't think of them now. I knew you would probably ask me. No, I don't recall.

Q. Incidentally when was this, when did you make that on-site visit at these various schools?

A. I believe that was probably, it was either January of '81 or December of '80, in that time frame.

Q. Did you make any kind of inquiry—by "you" I am talking about either you or your co-worker. Did you make any kind of inquiry as to how long the Title I room had been located at that particular site?

A. No, not to my knowledge, we didn't.

Q. Did you talk to the Title I teacher about finding, for

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[197] assistance in their problem areas, from the teachers and principals in the school?

A. I would imagine that they do. That would probably be the first contact.

Q. Is the Catholic school teacher prohibited from discussing religious topics and religious matters in counseling with those students?

A. I really couldn't answer that. I don't imagine they would be prohibited; certainly not to my knowledge.

Q. Let me go to Our Lady of Americas School, you indicated that you had received word that there was a crucifix in the Title I room at Our Lady of Americas School.

A. That's correct.

Q. And you went over and discussed the matter with the principal first?

A. Yes.

Q. And ultimately also did you have discussion with the parish pastor?

A. I did not have a direct discussion with him. That was handled by way of the principal.

Q. What was the principal's objection to taking down the crucifix?

A. I don't recall that the principal had any objection. I am not real sure who was taking the position that it shouldn't be taken down.

[198]

Q. What position was expressed to you?

A. Well, the principal indicated that the pastor and their local school board, which represented the parents, were somewhat aghast at the thought of taking the crucifix down in one of their classrooms.

I think you would have to understand these are people who did not fully understand the Title I Program and the various restrictions that were provided to make sure that this bypass provision would work.

Q. Were you informed as to why either the principal, or whoever the principal was representing on that particular problem, why they were concerned about a religious symbol being taken down in what has been described throughout this trial as a secular class or secular program?

A. Could you repeat that, please?

Q. Did you receive any information from the principal as to why there was concern about a religious object being taken down from a room which is being used exclusively for a secular class or secular program?

A. No, I just received from the principal some reasons that were not the principal's, on why they didn't have it down.

Q. Do you have any knowledge as to why religious objects are included in areas of a school that is used primarily for the teaching of secular topics?

MR. WILSON: I object to that, Your Honor. I

* * *

[201] than Monsignor Leibrecht, as you understood his testimony?

A. I have found, Mr. Boothby, that the term "authority", I have never really figured out how to measure that as it relates to the church.

My role as superintendent of schools is fairly similar to his, the difference being that they have a lot more schools and a larger staff to provide services. But essentially we both exist for the same purpose. And that is to provide a service in various areas for the operations of the schools.

Q. When there was a problem that developed at Our Lady of Americas School three or four years ago with reference to the crucifix, my understanding is that you went to the Bishop?

A. The Bishop, yes.

Q. When you went to the Bishop, you were instructed to go and take care of it yourself?

A. Yes.

Q. Did he tell you specifically how to take care of it?

A. No, he did not.

Q. Were you acting under his authority when you went and took down the crucifix?

A. I believe I was acting just on my own best judgment at the moment how to resolve the problem.

Q. Did you feel you had the authority to go in the parish school

* * *

(13) (13) (10)

Nos. 84-237, 84-238, 84-239

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*,

Appellants,

v.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

SECRETARY, U.S. DEPARTMENT OF EDUCATION,

Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

BRIEF *AMICUS CURIAE* FOR THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Is a government program which funds and administers remedial education services provided by public employees on the premises of church schools during regular school hours unconstitutional?

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

The Anti-Defamation League of B'nai B'rith submits this brief in support of the appellees and respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

INTEREST OF THE *AMICUS CURIAE*

The Anti-Defamation League of B'nai B'rith was founded over seventy years ago to combat racial and religious prejudice and discrimination in the United States. The Anti-Defamation League has always adhered to the principle that these goals, as well as the strength, stability and integrity of our democracy, can only be served by vigorous support of the First Amendment, mandating separation of church and state and guaranteeing the free exercise of religion.

In support of these beliefs the Anti-Defamation League has in the past filed briefs *amicus curiae* in this Court supporting both the mutual independence of government and religion, and the First Amendment rights of religious minorities. *E.g., Thornton* v. *Caldor*, No. 83-1158 (Sup. Ct. argued Nov. 7, 1984); *Lynch* v. *Donnelly*, ___ U.S. ___, 104 S. Ct. 1355 (1984); *Marsh* v. *Chambers*, ___ U.S. ___, 103 S. Ct. 3330 (1983); *Mueller* v. *Allen*, ___ U.S. ___, 103 S. Ct. 3062 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

The rights of minority religions are no less at stake in establishment clause cases than in free exercise cases. History has demonstrated that the inevitable result of a union of government and religion is the destruction of religious freedom for those who believe differently from the majority. The Anti-Defamation League, therefore, has consistently advocated a strict interpretation of the establishment clause, in order to protect "our remarkable and precious religious diversity as a nation." *Lynch* v. *Donnelly*, 103 S. Ct. 1355, 1371 (Brennan, J., dissenting).

SUMMARY OF ARGUMENT

This case presents to the Court a narrow issue of constitutional law. Neither congressional authority and commitment to funding remedial educational services for economically and educationally

deprived children, nor the responsibility of local educational agencies to provide public and nonpublic students with comparable remedial services, is at issue. In supporting appellees' challenge to the constitutionality of New York City's Title I program, *Amicus* submits that the City has chosen to provide those services in a manner which is not required by federal law and which violates the establishment clause. *Cf. Wheeler* v. *Barrera*, 417 U.S. 402, 419 (1974) ("the State is not obligated by Title I to provide on-the-premises instruction.").

The constitutionality of New York City's Title I program is governed by this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975) and *Wolman* v. *Walter*, 433 U.S. 229 (1977), holding that government financed remedial instruction, guidance counseling and therapeutic services provided on parochial school premises violate the First Amendment. New York City's Title I program falls squarely within this prohibition and should be ruled unconstitutional on its face.

Providing Title I services in parochial schools in conformity with the parochial schools' schedule and school calendar substantially enhances the school's ability to attract students, thereby promoting its religious mission. The religious atmosphere under which public employees are required to teach pervades the publicly funded classes, further diffusing the schools' religious influence.

In addition, New York City's Title I program requires interaction between public and religious authorities which constitutes excessive entanglement prohibited by the First Amendment. The impermissible entanglement between government and religion occasioned by the program can be eliminated by implementing alternative plans for Title I services which would involve off-premise teaching and counseling.

The availability of Title I services for educationally deprived children from low income areas on the premises of church-sponsored schools, presents an appealing case in which personal sympathies may be in conflict with our obligation to uphold establishment clause principles. *Amicus* recognizes that only a

thorough reformulation of New York City's Title I program will cure the constitutional defects inherent in the provision of publicly funded education services on the premises of religious institutions. *Amicus* believes, however, that in order to maintain the letter and the spirit of the First Amendment, the program must be struck down.

The establishment clause principles which have guided this country and this Court for over 200 years must be applied even-handedly. This fundamental precept is crucial in cases in which this Court's decision will have a significant and lasting effect on the institution of public education in the United States. *See Brown* v. *Board of Education*, 347 U.S. 483 (1954).

ARGUMENT

POINT ONE

NEW YORK CITY'S TITLE I PROGRAM ADVANCES RELIGION BY SPONSORING PUBLICLY FINANCED EDUCATIONAL ACTIVITIES ON PAROCHIAL SCHOOL PREMISES

A. New York City's Title I Program Is Unconstitutional On Its Face

The provisions of New York City's Title I program compel a holding of facial unconstitutionality. By providing remedial instruction classes, guidance and counseling sessions in the pervasively religious atmosphere of church-sponsored elementary and secondary schools, the City has extended the religious function of the parochial school to encompass the publicly funded services.

Although appellants (defendants below) have stressed the eighteen year history of New York City's program as evidence that Title I has not fostered religion, this Court need not engage in an examination of the plan's day-to-day implementation in order to hold New York City's Title I program unconstitutional. *See, e.g., Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S. 229 (1977). While in *Wheeler* v. *Barrera*, 417

U.S. 402, 426 (1974), the Court refused to rule on the constitutionality of a Title I plan not yet formulated, stating "the First Amendment implications may vary according to the precise contours of the plan that is formulated," in contrast, the Title I program before the Court today is in place and operating. It can, therefore, be examined in detail.

Although the majority in *Meek*, 421 U.S. 349, 372, did not rest its decision on "effect" grounds, the Court noted the "potential for impermissible fostering of religion" which exists when public employees provide services in church-related schools:

> To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.

Meek, 421 U.S. at 371 (citations omitted).

The remedial instruction offered under Title I is equally, if not more, important than the services challenged in *Meek*. Because the instruction is intended to improve a child's overall school performance, frequent conferences between Title I professionals and the parochial school authorities are essential. These meetings must necessarily include discussion and evaluation of the parochial student's behavior, progress and/or problems in areas of education under the control of religious authorities. In addition, Title I professionals in some areas concentrate instruction on skills easily transferrable to other classes and activities. In order for Title I professionals to provide effective assistance to their students, a thorough understanding of the nature and requirements of other school courses is necessary. The conferences between public employees and parochial authorities are not supervised or observed by Title I field supervisors. They provide frequent opportunity for public employees to absorb the religious values and influence of the host school and to pass it on, uncensored, to their students.

The Second Circuit was unpersuaded by the appellants' claim that no recorded complaint has been made of interference by parochial authorities with Title I services or that public teachers have engaged in religious activity. The court of appeals, in fact, slip op. at 35, found a "lack of any incentive for complaint":

> The nonpublic schools, which had to apply for Title I assistance, are happy to have it, even, perhaps all the more, if an occasional teacher or counselor has strayed into religious paths. Similar considerations apply to the students; they have chosen to have, or at least have become used to having, some degree of religious content in their instruction, and are unlikely to notice or complain if some of this should find its way into the remedial classroom or counseling center. The same considerations apply to the parents. Teachers and counselors will not complain of their own conduct even assuming they recognize, as they may not always do, that they have crossed the line.

Slip op. at 35-36.

B. New York City's Title I Program Benefits Religion By Advancing the Religious Values of Church Schools

In *Wolman* v. *Walter*, 433 U.S. 229, 247 (1977), the Court upheld public funding of remedial, therapeutic and guidance services for parochial students only where the services were provided under circumstances reflecting "religious neutrality." A primary consideration in defining neutrality was the situs of the services. The *Wolman* Court interpreted *Meek*, 421 U.S. at 371, as "acknowledg[ing] the danger that publicly employed personnel who provide [analogous] services . . . might transmit religious instruction and advance religious beliefs in their activities. But . . . this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." *Wolman*, 433 U.S. at 247 (citation omitted). It was the *environmental* pressures which the Court found might alter teachers' behavior. Recognizing that the danger identified in *Meek* originated from the religious nature of the institution, not the students, 433 U.S. at 247-248, the *Wolman* Court held that

remedial and therapeutic services provided to parochial school students at off-site neutral premises will not have the effect of advancing religion in violation of the establishment clause.

Attempts by the City and the church schools to reduce the religious atmosphere of the parochial host schools fail to neutralize the effect of the Title I program, according to the finding of the court of appeals below. Church schools are instructed by the City to remove religious symbols from classrooms used for Title I instruction. Further, religious school authorities have argued that the schools in the program are not the "pervasively religious" institutions described in *Meek*, 421 U.S. at 356. Notwithstanding, the absence of religious symbols in Title I classes is immaterial in light of the religious symbolism which remains in hallways, meeting rooms and other classrooms. Further, neither the removal of religious symbols nor self-serving assertions by school and religious authorities can change the essentially religious nature of the schools. After reviewing the evidence, including affidavits from religious school administrators, the Second Circuit stated: "Indeed, the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values." Slip op. at 42 (footnote omitted).

The benefit to parochial schools in this case goes far beyond permissible accommodation. *See Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952), this Court held that released time for religious instruction off the premises of public schools posed no establishment problems, stating: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." The *Zorach* Court went on to state, however, that "[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education

. . . ." 343 U.S. at 314. The facts of the case before the Court today fall squarely within the prohibitions articulated in *Zorach*. Mingling public and parochial classes on the premises of church schools cannot be regarded as simply "respecting" the religious nature of children who are eligible for Title I assistance and attend parochial schools. Rather, the City's Title I program constitutes the "blend" of church and state education of the type proscribed in *Zorach*.

C. By Providing Public Instruction in Church Schools, Government Appears To Be Endorsing Religion and Religious Teaching

This Court's establishment clause analysis has consistently reflected a heightened concern for government financed religious activities which involve elementary and secondary school children. *See, e.g., School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). *Cf. Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981). Recognizing this concern in *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), the Second Circuit declared:

> Our nation's elementary and secondary schools play a unique role in transmitting basic fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit . . . . Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected.

635 F.2d at 978 (citations omitted).

New York City's Title I program entails considerably more than "the mere appearance of secular involvement." *Id.* The City has, in effect, inserted important and highly visible elements of a public school program, operated by public school personnel and funded by public money, into the curriculum of religious

schools, thereby supporting and advancing religion in violation of the First Amendment.

The distinction between elementary and secondary schools, on the one hand, and colleges and universities, on the other, is clearly demonstrated by the Court's opinion in *Widmar* v. *Vincent*, 454 U.S. 263, 274, n.14 (1981), where the majority stated: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy [of allowing religious groups access to campus facilities] is one of neutrality toward religion." Unlike the students in *Widmar*, however, the students in New York City's Title I program are elementary and secondary age level children.

For these young and impressionable students, importing public school teachers into the parochial schools and providing classes on the religious school premises places the imprimatur of the state upon the parochial schools. Students may be unable to distinguish the state as the administrative sponsor of the remedial reading and arithmetic classes, in contrast to other reading and arithmetic classes sponsored by the parochial school. The Title I classes are integrated into the school schedule and are held in the same buildings as the students' regular classes. Moreover, it is unlikely that students at this age would be aware that the state pays the salary of some of their teachers, but that others are paid by parochial authorities, much less the constitutional significance of this difference.

Attempts by religious authorities to emphasize neutral aspects of New York City's church schools do not negate the powerful symbolic benefit to religion derived from on-premise Title I instruction. In striking down Massachusetts' unconstitutional delegation of legislative veto power to churches, this Court declared "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin* v. *Grendel's Den*, ___ U.S. ___, 103 S. Ct. 505, 511 (1982). The import of community reaction to relations

between government and religion was also noted in *Lynch* v. *Donnelly*, ____ U.S. ____, 104 S. Ct. 1355, 1367 (1984) (O'Connor, J., concurring).

The state has effectively endorsed the religious mission of the religious schools by entering into a joint education program on the premises of church schools. The perception of the student and adult community is that New York City has placed its imprimatur on religious institutions.

POINT TWO

NEW YORK CITY'S TITLE I PROGRAM EXCESSIVELY ENTANGLES GOVERNMENT WITH RELIGION

A. Government Is Excessively Entangled with Religion when Public and Parochial Activities Are Merged and when Constant Surveillance Is Required to Maintain the Secular Content of Public Instruction

This Court's decisions on the unconstitutionality of publicly funded education services on parochial school premises are controlling. *Meek*, 421 U.S. 349. *Cf. Wolman*, 433 U.S. 229. Like the programs at issue in these cases, New York City's Title I program creates excessive entanglement between government and religion by merging secular and parochial instruction and by promoting associations between public and parochial employees for conferences in a pervasively religious atmosphere. Further, an obligation is imposed on the state to scrutinize the religious activities, content and values of secular personnel and instruction because the remedial services are provided on the premises of religious institutions.

Appellants have claimed that Title I supervisors ensure the nonreligious content of Title I instruction. Ensuring religious neutrality, in this case, however, requires excessive entanglement of the state employees with religion. This Court has articulated the constitutional necessity of such supervision:

> To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would

> have to impose limitations on the activities of auxiliary personnel and then engage in some form of a continuing surveillance to ensure that those restrictions were being followed.

Meek, 421 U.S. at 372 (footnote omitted). This is because the "State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Meek*, 421 U.S. at 371, quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). Relying on *Lemon*, the *Meek* Court reiterated that the "prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. 421 U.S. at 370.

To the extent that New York City's Title I supervision is constant and intrudes on religious activities, therefore, it constitutes impermissible excessive entanglement. Moreover, many areas of interaction between public and parochial teachers are completely unsupervised and present unrestricted opportunity for unconstitutional blending of secular and sectarian instruction. *See* this brief, Point I *supra*. The Supreme Court has stated, as the court of appeals in this case noted, that a court cannot rely on the "good faith and professionalism of secular teachers and counselors functioning in church-related schools" to maintain a strictly nonreligious posture. *Meek*, 421 U.S. at 369.

In *Wolman* v. *Walter*, 433 U.S. 229 (1977) this Court emphasized that the entanglement dangers recognized in *Meek* arise from the religious nature of the host school, and ruled that publicly funded therapeutic and remedial services could be provided to parochial students in religiously neutral locations. New York City's church-sponsored schools are obviously not religiously neutral. Neither the removal of some religious symbols nor the assertions of school authorities as to the religious nature of the schools can neutralize the essentially religious environment, or obviate the need for constant government surveillance.

B. The Surveillance Required By New York City's Title I Program Is Distinguishable from that Routinely Required in Public Schools and Can Be Avoided By Alternative Programs

Supervision of New York City's Title I professionals must ensure that remedial instruction, guidance and counseling services remain religiously neutral, and that public employees remain independent of religious authorities and influence when they are working in religious institutions. The Solicitor General has argued, *see* Brief for the Secretary of Education 37, that the surveillance required of public authorities over Title I instruction and professionals "is no different, in principle, from the 'surveillance' that may be necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions." The Solicitor General's argument is totally without merit. The obligation to maintain the secular independence of public school personnel operating within church-sponsored schools involves far greater entanglement with religion than efforts by public school authorities to maintain a religiously neutral environment in the nonreligious public schools. Instructing public school teachers that daily recitation from the Bible and state composed prayer has been ruled unconstitutional by this Court requires no contact with religious activities or religious authorities and takes place in a nonreligious environment. In sharp contrast, supervision of Title I professionals in church schools requires detailed observation of classroom activity, teacher conduct, and ongoing, continuous contact between public and parochial personnel. Most important, the activity which must be monitored by the state, as well as the surveillance, takes place in a religious environment. *See Lemon*, 403 U.S. 602; *Meek*, 421 U.S. 349.

The degree of surveillance required under *Meek*, which rises to the level of unconstitutional entanglement with religion, can easily be avoided by an alternative Title I plan. Thus, a decision by this Court striking down the present plan need not result in any educational deprivation to parochial students. In developing alternative plans it should be noted that the requirements of Title

I do not specify equality in *services* as regards public and parochial school students. Although equality in *expenditures* is required, 20 U.S.C. 2740(a), Congress left formulation of Title I programs to the discretion of the local educational agency, encouraging school districts "to employ imaginative thinking and new approaches to meet the educational needs of poor children." S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1455.

Any alternate plan must take into consideration the constitutional parameters in this area. In *Wheeler* v. *Barrera*, 417 U.S. 402, 421 (1974), the Court noted that Congress recognized "that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area." In New York City, the court of appeals noted, an early proposal to include parochial school students in Title I classes held in public schools with public students was rejected in part because of concern that it would violate the New York Constitution, Art. XI, § 3. Slip op. at 7.

This Court stated in *Wheeler* that it is the responsibility of the local educational agencies to devise a constitutional means of providing Title I services to parochial school students. Although the Court recognized that it "may well be a significant challenge," 417 U.S. at 423, Justice Blackmun's language was instructive:

> Of course, the cooperation and assistance of the officials of the private school are obviously expected and required in order to design a program that is suitable for the private school . . . and the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests.

Wheeler, 417 U.S. at 424. Justice Blackmun also noted alternative programs listed in the Senate Report accompanying passage of Title I in 1965:

> Among the examples there listed are teacher aides and instructional secretaries; institutes for training teachers in

> special skills; supplementary instructional materials; curriculum materials center for disadvantaged children; preschool training programs . . . enrichment programs on Saturday morning and during summer; instructional media centers to provide modern equipment and materials; programs for the early identification and prevention of dropouts; home and school visitors and social workers; supplemental health and food services; classrooms equipped for television and radio instruction; mobile learning centers; educational summer camps; summer school and day camps; shop and library facilities available after regular school hours; work experience programs; Saturday morning special opportunity classes; home oriented bookmobiles; afterschool study centers. . . .*

Wheeler, 417 U.S. at 425, n.20.

Clearly, alternatives to programs on church school premises exist which obviate the need for impermissibly entangling surveillance, should New York City choose to implement an alternative Title I program.

POINT THREE

THE DIRECT AND SUBSTANTIAL GOVERNMENT AID TO PAROCHIAL SCHOOLS DERIVED FROM NEW YORK CITY'S TITLE I PROGRAM CAN BE DISTINGUISHED FROM GOVERNMENT AID THAT HAS PREVIOUSLY BEEN HELD PERMISSIBLE

In *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947), the Court upheld a state statute which authorized reimbursement to parents for expenses incurred in busing their children to parochial schools, while noting that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." Similarly, the Court noted the fact that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school," in

* *Amicus* does not necessarily endorse all of the above-mentioned approaches to Title I services. They are offered, as in *Wheeler*, simply to demonstrate that numerous alternative programs can be considered.

Board of Education v. *Allen*, 392 U.S. 236, 244 (1968). The cost of bus fares and textbook loans, of course, does not compare with the expense of remedial mathematics and English instruction, guidance and clinical services provided under Title I. Moreover, the Court's decisions in *Everson* and *Allen* rest on grounds which are easily distinguishable from the case at issue. In *Everson*, the Court was concerned that reimbursing bus fares of public school students, while denying the same benefit to parochial school students, would evidence government hostility to religion. *Everson*, 330 U.S. at 17-18. By contrast, invalidating Title I instruction on parochial school premises would merely prompt the City to devise a constitutional means of providing remedial services to parochial school students.

In both *Everson* and *Allen*, the Court relied on the secular nature of the state aid to parochial schools, *i.e.*, bus rides and nonreligious books. *Allen*, 392 U.S. at 244-245. In upholding textbook loans, the *Allen* Court relied on the fact that the statute in question would not involve the state with the teaching of religion in parochial schools. *Allen*, 392 U.S. at 248. While it is difficult to change the secular nature of a book or a bus ride, the aid provided under Title I, *i.e.*, teachers, guidance and counseling professionals, cannot be so easily contained. Teachers, unlike books, can absorb the religious atmosphere in which they work and, in turn, reflect that bias to students, with unconscious inattention to establishment concerns. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971) ("Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."). Moreover, as *Meek* makes clear, we cannot rely on the "good faith and professionalism" of teachers, *Meek*, 421 U.S. at 369, to ensure the religious neutrality of public instruction in church schools.

In addition, remedial education instruction is infinitely more valuable to school children than state financed bus fares or textbook loans. In the Senate Report accompanying the Elementary

and Secondary Education Act of 1965, the Labor and Public Welfare Committee stated:

> Title I can be considered as another very potent instrument to be used in the eradication of poverty and its effects. Under title I of this legislation the schools will become a vital factor in breaking the poverty cycle by providing full educational opportunity to every child regardless of economic background.

S. Rep. No. 146, 89th Cong., 1st Session, *reprinted* in 1965 U.S. Code Cong. & Ad. News 1446, 1450. Remedial instruction and services received through Title I funding may determine a child's future success in higher education or employment. Many parents of children eligible under Title I would not send their children to parochial schools if the remedial services were not available on the premises. The availability of such services enhances the attraction of parochial schools and may well augment student enrollment, fostering the school's religious mission. Undoubtedly, the parochial school students receiving the services, and their parents, are aware of the substantial benefit of receiving Title I instruction during the regular school day on the premises of their own parochial schools. No additional cost, traveling or time is required of the parochial school students. In addition, the availability of on-site remedial education services operates as a powerful enrollment inducement for parochial schools.

These benefits are more substantial and more direct than the tuition tax deductions at issue in *Mueller* v. *Allen*, ___ U.S. ___, 103 S. Ct. 3062 (1983). In *Mueller*, the state was not directly involved with religious institutions. Tuition aid was funneled through parochial school *parents*, which, the Court held, "reduced Establishment Clause objections." *Mueller*, 103 S. Ct. at 3069. The *Mueller* Court ruled that the "attenuated financial benefits flowing to parochial schools" under the challenged Minnesota statute, do not violate the prohibitions of the First Amendment. In the case at issue, however, public funding flows directly from the government into the parochial schools in the form of remedial instruction and counseling services. Public employees

are present on parochial school premises to administer the program, unlike *Mueller*, where tuition tax deductions were evaluated by public employees in state offices. Although the majority in *Mueller* rejected statistical evidence demonstrating the ultimate beneficiaries of the tuition tax program, such statistics are not necessary here. The involvement of church-related schools in the Title I program is undisputed, and the availability of Title I services on the premises of the parochial schools is a "blend [of] secular and sectarian education" which is prohibited by the establishment clause. *Zorach* v. *Clauson*, 343 U.S. 306, 314.

In *Lynch* v. *Donnelly*, ___ U.S. ___, 104 S. Ct. 1355, 1366 (1984), citing with approval to *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975), this Court stated: "Taken together these cases abundantly demonstrate the Court's concern to protect the genuine objectives of the Establishment Clause." Amicus submits that this Court's precedential rulings on government aid to religious schools compel a decision invalidating New York City's Title I program as it relates to parochial schools.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit, holding New York City's Title I program unconstitutional, should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, et al.,
Appellants,

v.

BETTY-LOUISE FELTON, et al.,
Appellees.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
Appellant,

v.

BETTY-LOUISE FELTON, et al.,
Appellees.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Appellant,

v.

BETTY-LOUISE FELTON, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH CONGRESS, THE NATIONAL EDUCATION ASSOCIATION, AND THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*, *AMICI CURIAE*, IN SUPPORT OF APPELLEES.

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QUESTION PRESENTED

Whether the government may undertake part of the educational function of religious schools by compensating and stationing public school teachers in religious schools to teach basic reading and mathematics skills without thereby violating the Establishment Clause.

INTEREST OF AMICI CURIAE

Amici are organizations dedicated both to preserving the guarantees of religious liberty set forth in the First Amendment and to strengthening and maintaining public education as a bulwark of our nation's democratic well-being. Amici, each of whom is listed in the margin, have been involved either directly or as amici curiae in many of the leading Free Exercise Clause and Establishment Clause cases in this Court and throughout the country.[1]

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[1] The American Civil Liberties Union; the American Jewish Congress; the National Education Association; the National Coalition for Public Education and Religious Liberty, on behalf of the following constituent organizations: the American Association of School Administrators, the American Ethical Union, Americans for Religious Liberty, the American Humanist Association, the Baptist Joint Committee on Public Affairs, the Board of Church and Society of the United Methodist Church, the Central Conference of American Rabbis, the Minnesota Civil Liberties Union, the Missouri Baptist Christian Life Commission, Monroe Citizens for PEARL, Nassau-Suffolk PEARL, the Michigan Council About Parochial Education, the National Association of Catholic Laity, the National Council of Jewish Women, the National Service Conference of the American Ethical Union, Preserve Our Public Schools, [cont'd. on next pg]

With the consent of the parties, indicated by letters lodged with the clerk, we file this brief amici curiae to bring our experience to bear on a case in which the Court must once again decide the permissibility of government aid to religious schools. In our view, the resolution of this case may well determine whether the separation of church and state that the Court has heretofore steadfastly protected will be seriously undermined.

Public Funds for Public Schools of New Jersey, the Ohio Association for Public Education and Religious Liberty, the Union of American Hebrew Congregations, the Unitarian Universalist Association; the Citizen's Union (New York), the New York Society for Ethical Culture, the United Community Centers (New York), the United Parents Association of New York City, and the Women's City Club of New York.

INTRODUCTORY STATEMENT

The New York City Board of Education assigns hundreds of public school teachers to some 231 parochial schools to teach basic reading and mathematical skills to children with below-average educational skills in localities with a high concentration of children from lower-income families. The classes, financed by Federal funds authorized by Title I of the Elementary and Secondary Education Act of 1965,[2] are integrated into the parochial school curriculum; are taught on parochial school premises by public school teachers who confer with their parochial school colleagues on the progress of each child; and are, quite properly, viewed as a valuable educational component of the total parochial school experience. Indeed, the success of the Title I program significantly

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[2] Pub. L. No. 89-10, 79 Stat. 27, as amended, 20 U.S.C. § 2701 et seq. (1982).

aids the ultimate success of the parochial school's educational mission.

This case is not about whether the delivery of such "remedial" educational services to economically and educationally deprived children attending parochial schools provides educational benefits to such children. Of course it does. Nor is it about whether society may encourage the delivery of such services by granting income tax deductions to donors who elect to support such a program, see Walz v. Tax Commission, 397 U.S. 664 (1970), or by granting certain broadly based tax benefits to parents who must bear a portion of its cost. Compare Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), with Mueller v. Allen, 77 L.Ed.2d 72 (1983). Nor is this case even about whether such services may be provided by the government to all poor children, including children enrolled in religious

schools, in a public setting. Compare Meek v. Pittenger, 421 U.S. 349 (1975) with Wolman v. Walter, 433 U.S. 229 (1977).

The only issue raised by this case is whether the government may aid a religious school in performing its core educational function by stationing public school teachers in religious schools to teach reading and mathematics skills. Amici believe that when the government sends public school teachers into religious schools to teach secular skills, the program cannot be characterized as a permissible form of "aid to the child," as opposed to forbidden "aid to the religious institution," without dissolving the intellectual underpinning of the distinction. Moreover, the physical mixing of church and state which New York City's program entails endangers both the independence of the benefitted religious institution and the secular nature of the

Title I educational program.

ARGUMENT

THE ESTABLISHMENT CLAUSE FORBIDS THE USE OF PUBLIC SCHOOL TEACHERS TO TEACH SECULAR SKILLS IN RELIGIOUS SCHOOLS

A. The Provision of Public School Teachers to Parochial Schools to Teach Secular Skills Constitutes Forbidden Aid to the Religious Institution and Cannot Be Fairly Characterized as Mere Aid to the Child.

This is at least the twentieth time in recent years that the Court has confronted the problem of defining the restraints imposed by the Establishment Clause on attempts to channel public resources to support religious education.[3] In an

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[3] Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Wheeler v. Barrera, 417 U.S. 402 (1974); Meek v. Pittenger, 421 U.S. 349 (1975); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Wolman v. Walter, 433 U.S. 229 (1977); New [cont'd. on next pg]

understandable attempt to respect the core values of the Establishment Clause while accommodating the constitutionally protected right to choose a religious education[4], the Court has attempted to distinguish between permissible government aid to the parents or children involved and forbidden aid to the religious institution itself. See, e.g., Committee for Public Education v. Nyquist,

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York v. Cathedral Academy, 434 U.S. 125 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980); Mueller v. Allen, 77 L.Ed.2d 721 (1983); School District of Grand Rapids v. Ball, cert. granted, 52 U.S.L.W. 3631 (U.S. Feb. 22, 1984) (No. 83-990). See also Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio), aff'd mem., 409 U.S. 808 (1972); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem. sub nom. Grit v. Wolman, 413 U.S. 901 (1973); Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974); United Americans for Public Schools v. Franchise Tax Board, 419 U.S. 890 (1975), aff'g No. C-73-0090 (N.D. Cal.); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979).

[4] The constitutional basis of a right to opt for a religious education flows from both the Free Exercise and Due Process Clauses. See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

413 U.S. at 780-87. Such a distinction is in some respects artificial, since any aid to parents and children inevitably aids the institution they have chosen to attend by freeing resources for use in other aspects of the religious school's program. Id. at 783. Nonetheless, distinguishing as it does between social benefits such as bus rides and diagnostic testing, on the one hand, and the core educational function of religious school, on the other, the line corresponds to the Court's correct sense of a vital Establishment Clause distinction between permitted and forbidden government assistance to religious education.

This distinction has permitted tangible aid to religious education in the form of bus transportation,[5] text book loans to students,[6] tax benefits for contributions and

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[5] Everson v. Board of Education, 330 U.S. 1 (1947).

[6] Board of Education v. Allen, 392 U.S. 236 (1968).
[cont'd. on next pg]

broadly based educational payments to religious schools,[7] assistance to parochial schools in administering and grading state-required standardized tests and in administering and evaluating diagnostic tests,[8] provision of therapeutic services,[9] and provision of auxiliary educational services to all children in a public setting.[10]

But see Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974).

[7] Walz v. Tax Commission, 397 U.S. 664 (1970); Mueller v. Allen, 77 L.Ed.2d 721 (1983).

[8] Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980).

[9] Wolman v. Walter, supra.

[10] Id. The Court has also approved federal construction grants to sectarian colleges, Tilton v. Richardson, 403 U.S. 672 (1971), state backing for bonds issued by sectarian colleges, Hunt v. McNair, 413 U.S. 734 (1973), and grants to sectarian colleges for maintenance of physical plant, Roemer v. Board of Public Works, 426 U.S. 736 (1976), on the ground that religiously affiliated colleges are not generally pervasively religious. See Hunt v. McNair, 413 U.S. at 743-44.

Conversely, whenever the State has attempted to assist religious schools in performing the basic teaching function which is the raison d'etre of a religious school, this Court has recognized that the Establishment Clause required the invalidation of the program. See generally Nyquist, 413 U.S. at 783-86. If public school teachers may enter the parochial schools to teach secular skills as part of the parochial school curriculum under the rubric of permissible "aid to children," no discernible, much less principled, Establishment Clause check will exist on massive aid to parochial schools. Accordingly, this Court has repeatedly invalidated attempts to subsidize the core teaching function of parochial schools.

At the very outset of the Court's school aid jurisprudence, all nine justices quite plainly agreed that aid to the educational function of such schools would be

unconstitutional. Everson v. Board of Education, 330 U.S. 1 (1947). Later, when Pennsylvania and Rhode Island sought to subsidize parochial school teachers for time spent teaching secular subjects, this Court invalidated the program. Lemon v. Kurtzman, 403 U.S. 602 (1973). When New York sought to pay parochial school teachers for preparing tests for use in teaching secular courses, this Court invalidated the program. Levitt v. Committee for Public Education, 413 U.S. 472 (1973). When Pennsylvania sought to pay for instructional materials and aids to be used in connection with secular subjects in the parochial school curriculum, this Court declared the program unconstitutional. Meek v. Pittenger, 421 U.S. 349 (1975). See also Wolman v. Walter, supra. Indeed, in Meek v. Pittenger, supra, this Court explicitly upheld a program that provided auxiliary educational services to all students on non-

religious school premises, but struck down a program designed to deliver auxiliary educational services to parochial students in parochial schools as an integral part of the parochial school curriculum.

While the line between permissible "aid to children" and forbidden aid to a religious school has, at times, been a wavering one, this Court has consistently recognized that the on-premises teaching function is at the heart of any educational enterprise. Accordingly, this Court has refused to permit public subsidization of the on-premises teaching function of a religious school, recognizing that, quite apart from the substantial risk of unconstitutional entanglement, see infra at 22-41, such subsidization constitutes unmistakable government aid to a religious institution in violation of the Establishment Clause. As the Court held in Meek, "it would simply

ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by ... church-related ... schools." 421 US. at 365. See also Wolman v. Walter, 433 U.S. at 249-51; Meek v. Pittenger, 421 U.S. at 363-66; Committee for Public Education v. Nyquist, 413 U.S. at 781-83; Everson v. Board of Education, 330 U.S. at 21-24 (Jackson, J., dissenting).

Appellants argue that, so long as aid is couched in a form that minimizes the danger of entanglement, the Establishment Clause poses no obstacle to the use of public school teachers to teach "remedial" secular skills on the premises of a parochial school as an integral part of the curriculum. However, even apart from the question of entanglement, public subsidization of the on-premises teaching function of a parochial school has repeatedly been held unconstitutional, and

judgment for the appellants would accordingly require overruling Meek, Wolman, and Nyquist.

If the use of public school teachers for on-premises teaching in a religious school is valid in a Title I "remedial" context, it must also be valid in an enrichment context; in a program for gifted children; or as part of a government takeover of broad segments of the secular curriculum, ranging from physical education to mathematics. Indeed, if the benevolent fiction of viewing aid to non-educational aspects of religious schools as aid to children is extended to the use of public school teachers for the on-premises teaching of secular skills in religious schools, then there would exist no logical or principled stopping point prior to the creation of joint educational enterprises, with public school teachers undertaking to teach broad areas of the secular curriculum and religious educators accepting

responsibility for religious instruction. Certainly neither the United States nor the other appellants suggest one.[11]

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[11] The Court should not content itself to permit this benign, apparently circumscribed program to pass constitutional muster, and ignore the Establishment Clause problems that would be presented by a program sending public school teachers into religious schools to teach further portions or all of the secular curriculum. In a landmark case for modern Establishment Clause doctrine, the Chief Justice wrote for the Court that the development of a coherent body of Establishment Clause principles requires the court to be sure that a small step in a certain direction will not lead to an undesirable destination:

> [I]n constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the 'verge' of the precipice lies.

Lemon v. Kurtzman, 403 U.S. at 624. See also Wolman v. Walter, 433 U.S. at 251 n. 18 (recognizing tension between Board of Education v. Allen and "continued adherence to the principles announced in our ... cases" and declining, therefore, to extend Allen). In short, the Court should not lightly dismiss the prospect of finding itself on a "slippery slope."

It strains credulity and "ignores reality" to suggest that direct public aid to the secular curriculum represents aid only to the child, but not to the institution itself. State provision of teachers of reading and mathematics subsidizes the core educational function that is the sine qua non of the operation of any school, public or parochial. Paying for a mathematics teacher is a far cry from paying for bus transportation. Contrary to the appellants' urgings, the Court's previous cases rest on this understanding that the religious schools as a whole have a religious purpose and function which is inevitably aided by government assistance to the core educational endeavor, not on the narrow and crabbed view that the only danger was that a particular teacher would deliberately cross the line. See, e.g., Meek v. Pittenger, 421 U.S. at

369-72.

Petitioners attempt to draw, but notably not to justify on any principled basis, a line that would permit aid in the present context but would not necessarily sanction aid to wider segments of the secular curriculum in religious schools. Petitioners seek to assure the Court that permitting public school teachers to teach secular skills on the premises of a religious school pursuant to the Title I program does not implicate the remainder of the secular curriculum because Title I skills are "remedial" and must by law supplement, and not supplant, the existing curriculum. 20 U.S.C. §§ 2734(f), 2736(c). However, such an attempt to differentiate "remedial" or "auxiliary" teaching from the "regular" educational function of any school is both educationally indefensible and wholly impractical, as well as without any logic in

constitutional principle.

As an educational matter, no clear line exists between remedial teaching and the regular curriculum, especially at the level of teaching basic skills. When a first-grade teacher teaches a child to read, it is impossible to divide the process between regular and remedial teaching. If the government may fund the so-called remedial phase of the process, what principle will preclude it from funding any subsequent phase? Both blend indistinguishably into an educational whole.

Moreover, from a practical standpoint, the concept of remedial teaching, even if it could be isolated and identified, is logically indistinguishable from a host of teaching functions, such as enrichment programs designed to deepen the traditional curriculum; programs to teach intellectually gifted children; programs designed to enhance

artistic and mechanical skills; and programs designed to increase vocational choice. Thus, attempts to carve the teaching function into slivers, some of which can be viewed as part of the regular curriculum and some of which would be viewed as supplemental or auxiliary, is nothing more than a blueprint for the gradual public takeover of an undefinable percentage, and perhaps all, of the teaching responsiblity of a religious school.

Whatever the undeniable social utility of increasing the quality of education in our nation's religious schools, it cannot be achieved by diverting teachers from the public schools to teach secular skills in religious schools under the fiction that the teachers are merely aiding children and not subsidizing a religious institution. While the concept of aid to children, as opposed to aid to religious institutions, may have

principled meaning as applied to benefits like bus transportation and health care, it begins to lose principled meaning the closer one gets to the core teaching function. Indeed, even the provision of textbooks and off-premises instructional services places a good deal of tension on the distinction. Wolman v. Walter, 433 U.S. at 251 n. 18. Were the concept of "aid to children" to be even further extended to accommodate the use of public school teachers to provide instruction in basic secular skills on the premises of the religious school itself, the distinction would cease to have meaning, and virtually any form of aid to the secular curriculum of a parochial school would be valid, so long as it followed the appropriate semantic formula of "aid to the child."

Of course, to argue that public school teachers may not be despatched to parochial schools to teach secular skills to

disadvantaged children is not to suggest that such teaching should not occur. However, the combination of indirect subsidization through the use of charitable constributions and broad-based tax benefits and the existence of mechanisms to permit the delivery of such services to all children in a public setting renders it unnecessary to erode the Establishment Clause to achieve a socially desirable end. We can have both respect for the Establishment Clause and effective instruction of disadvantaged children in parochial schools.[12]

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[12] Although appellants urge that they tried measures short of placing public school teachers in religious schools, the record makes clear that such efforts were half-hearted at best. Title I was passed in 1965; the present program was in effect by 1966.

B. The Use of Public School Teachers to Provide Instruction in Secular Skills on the Premises of a Religious School Constitutes a Per se Entanglement of Church and State In Violation of the Establishment Clause.

In part A, supra, amici have argued that paying public school teachers to teach secular skills on the premises of a parochial school must be viewed as government aid to a religious institution. This Court has also recognized that even if such a program could be described as "aid to the child" and not forbidden aid to a religious institution, it nevertheless falls afoul of the Establishment Clause because it results in the entanglement of church and state.

The entanglement prong of this Court's three-part test in Establishment Clause cases is designed to advance two significant policies. First, it safeguards the independence of religious institutions by

assuring that secular officials do not acquire the power to influence or interfere with the decisions of religious bodies; and, second, it assures that religious bodies do not exercise influence in the administration of government programs. The stationing of public school teachers on parochial school premises to teach secular subjects to parochial school students compromises both values.

1. The Danger of Religious Influence on Secular Programs.

The bulk of this Court's entanglement analysis has centered on assuring that the administration of secular programs involving religious institutions remains free from religious influence. See, e.g., Larkin v. Grendel's Den, 459 U.S. 116, 125-27 (1982); Wolman v. Walter, 433 U.S. at 254; Meek v. Pittenger, 421 U.S. at 367-72; Lemon v. Kurtzman, 403 U.S. at 618-19. Whenever a

program has exhibited the potential for religious influence in the administration of a secular program, this Court has invalidated it.

In Lemon v. Kurtzman, supra, this Court invalidated a 15 percent state subsidy of parochial teachers' salaries, designed to reflect time spent teaching clearly secular subjects, on the ground that the religious nature of the institutions involved created a danger that religious impulses would influence the teaching of the secular program.[13] 403 U.S. at 615-20. In Committee for Public Education v. Nyquist, this Court invalidated state grants to parochial schools for the maintenance of physical plant because the religious nature of the institution

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[13] While the Court's analysis in Lemon centered on entanglement, the case is equally explicable as an example of this Court's refusal to permit public aid to the on-premises teaching function of a parochial school.

created a danger that the grants would be used, not solely for the upkeep of secular facilities, but for the maintenance of religious facilities as well. 413 U.S. at 774-780.[14] In Levitt v. Committee for Public Education, payments to parochial schools for teacher-prepared texts were invalidated because of the danger that religious concerns would influence decisions about the content of the tests. 413 U.S. at 480-81.[15] In Meek v. Pittenger, and Wolman v. Walter, payments to parochial schools for instructional materials and teaching aids were invalidated for the same reasons. Indeed, the Court in Meek ruled that the provision of auxiliary

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[14] The Court's concern with entanglement in Nyquist is equally explicable as a refusal to permit aid to a religious institution, regardless of the aid's intended use.

[15] Levitt is yet another example of this Court's refusal to countenance aid to the core teaching function of a parochial school, no matter what form the aid takes.

services to parochial school students on the premises of the parochial school was invalid because, despite the secular nature of the services, the religious nature of the institution created an inevitable risk that religious influence would affect the secular program. The Title I program at issue in this case is, therefore, as the Second Circuit ruled, directly governed by Meek, and cannot be upheld without overruling that decision.

This Court's understandable concern in Lemon that the administration of a secular teaching program in the context of a religious school poses an inevitable risk that secular teaching would influence religious concerns has touched off a legislative search for a fail-safe method of aiding the so-called secular aspects of parochial education without risking religious intrusion into the process. Given this

Court's recognition that when secular services are delivered by employees of religious schools, the danger of religious influence on the secular program is unavoidable,[16] the focus has shifted to public delivery of the services.[17] Where the services are delivered to all children in a public setting (or are otherwise incapable of religious influence) this Court has sustained the programs.[18] Where, however, as here, the services are delivered on the premises of the religious school in a form that is clearly subject to religious influence, this Court has invalidated the program. Meek v.

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[16] See, e.g., Wolman v. Walter, 433 U.S. at 254; Meek v. Pittenger, 421 U.S. at 366; Committee for Public Education v. Nyquist, 413 U.S. at 786-87 Lemon v. Kurtzman, 403 U.S. at 618-19.

[17] See, e.g., Everson v. Board of Education, supra; Wolman v. Walter, supra; Committee for Public Education v. Regan, supra.

[18] Everson v. Board of Education, 330 U.S. at 17-18; Wolman v. Walter, 433 U.S. at 239-44; Committee for Public Education v. Regan, 444 U.S. at 657-59.

Pittenger, supra; Wolman v. Walter, supra.

Appellants argue that, despite the conceded danger of improper religious influence on a secular educational program whenever children are taught on the premises of a parochial school, New York City's program is acceptable because (1) little evidence exists in the record that religion has played a role in the Title I program in New York City, and (2) since the teaching is performed by public employees who are, often, not adherents of the religion that sponsors the school, the danger of religious influence is so small that it can be ignored. This argument cannot withstand analysis.

In the first place, although appellants repeatedly refer to the record as undisputed, the record in this case is not nearly sufficient to warrant the conclusions appellants seek to draw. Relying on Meek v. Pittenger's clear holding that the

Establishment Clause does not permit the public provision of teachers in religious schools,[19] counsel below took the position that the particular facts of the day-to-day experience of such teachers in New York's classrooms was irrelevant. Thus, plaintiffs neither submitted their own evidence as to the actual influence of the religious setting on the religious school Title I teachers, or the extent to which the Title I teachers inhibited religious activities, nor cross-examined defendants' testimony in that regard. Accordingly, this record could hardly support a new rule of constitutional law. See Rescue Army v. Municipal Court, 331 U.S. 549 (1947). At the least, if the Court believes that it may wish to reconsider the firm rule of Meek and its predecessors, a

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[19] See also Wheeler v. Barrera, 417 U.S. at 428 (Powell, J., concurring) (doubting constitutionality of utilizing public school teachers in religious schools).

remand is necessary for a fuller factual record. Cf. Wheeler v. Barrera, supra.[20]

Moreover, even those teachers who do not share the religion of the parochial school to which they are assigned will feel a degree of constraint in assuring that lessons are not incompatible with, or offensive to, their religious "hosts". In addition, to the extent that an effective Title I "remedial" program requires coordination with the general curriculum, Title I teachers must -- and do -- meet regularly with the parochial school staff to dovetail the "remedial" programs with the remainder of the

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[20] Amici, of course, do not urge such a remand, believing that enforcement of the values of the Establishment Clause requires a clear, prophylactic line such as the Court has previously enunciated. A rule which would impose on litigants seeking to enforce vital constitutional rights the enormous burden and expense of litigating the facts of the secular nature of education in hundreds of parochial school classrooms in large cities such as New York is a prescription not only for entanglement, but also for meaningless, because unenforceable, constitutional guarantees.

curriculum, posing yet another likelihood that the administration of the Title I program will be influenced -- in perfect good faith -- by the religious themes and values that pervade the curriculum of any religious school. Finally, entanglement is inevitable (even if wholly unexplored in this record) by virtue of the discipline that the religious school imposes on students in Title I programs: as set forth infra at 39-40, religious schools (like others) suspend students for breaches of school rules. Where those suspensions are based on infractions of religious duties, either such religious violations will result in forced absence of students from Title I classes -- and the effective conditioning of access to a public program on a religious test -- or coordination will have to take place to ensure that the student is allowed to attend the "secular" class alone. The Court has

frequently condemned programs leading to such "Scylla-Charybdis" choices. See, e.g., Committee for Public Education v. Nyquist, 413 U.S. at 788.[21] Thus, despite New York City's attempt to avoid the danger of entanglement, any attempt to teach secular subjects on the premises of a parochial school, even by public school teachers, poses an unacceptably high risk of religious involvement in the secular program.

2. The Danger of Secular Influence on Religious Programs.

The bulk of this Court's concern in the area of entanglement has been with assuring

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[21] Appellants also overlook the fact that approximately 30 percent of the teachers involved in New York's program -- many of whom teach in the same Title I school year after year -- are of the same religious affiliation as the schools in which they teach, posing the very real danger of a good faith and wholly understandable tendency to blur the line between the pervasively religious atmosphere of the school and the wholly secular goals of the Title I program. See, e.g., Lemon v. Kurtzman, 403 U.S. at 617-19; Wolman v. Walter, 433 U.S. at 247-48, 254.

that secular programs are not influenced by religious criteria. As this case demonstrates, the Court's concern has resulted in attempts to evolve a mechanism for public aid to parochial education that minimizes the possibility of religious influence by excluding religious personnel from the program and entrusting its administration to public school teachers.[22] As amici have argued, such an "on-premises" program constitutes forbidden aid to the religious institution and creates an unacceptable risk of religious influence on the secular program. But even if the benevolent fiction of "aid to the child" is expanded to cover on-premises teaching in a parochial school, and even if the substitution of public school teachers for parochial school teachers mitigates the

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[22] See also School District of Grand Rapids v. Ball, supra.

danger of religious influence on the secular program, the cure is far worse than the disease, because, by stationing public school teachers in a religious school, New York City's program threatens the autonomy of the religious institutions themselves.

This Court has, thankfully, had little experience with government attempts to implant secular officials in religious institutions to carry out purely secular functions; but the widespread use of the practice in less fortunate societies bears unsettling witness to the threat to religious autonomy entailed by such a program. In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979), this Court recognized "the critical and unique role of the [parochial] school teacher in fulfilling the mission of a church-operated school" whose very raison d'etre is the propagation of a religious faith.[23] This Court construed the National

Labor Relations Act narrowly to avoid importing a secular influence into the parochial school. New York City's Title I program, by placing a public school teacher on the premises of a parochial school to teach secular skills, constitutes a greater threat to religious autonomy than the prospect of a labor union in Catholic Bishop. The threat is magnified because no principled basis exists to distinguish between government responsibility for "remedial" teaching, as in Title I, and government takeover of broad categories of the parochial school curriculum, ranging from programs for gifted children to programs designed to enrich the traditional curriculum. The fact that some religious institutions are, apparently, prepared to

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[23] See also Everson v. Board of Education, 330 U.S. at 22-24 (Jackson, J., dissenting) (discussing Cannon Law regarding religious education of Catholic children).

risk their autonomy in order to receive a financial benefit does not mitigate the danger. History teaches that religious autonomy is at least as vulnerable to the financial carrot as it is to the stick.[24]

Even though New York City school officials have commendably adopted certain prophylactic measures designed to minimize certain entanglement problems, these measures themselves create impermissible entanglement. Under the New York City plan, public officials must never cease monitoring all aspects of the Title I program in parochial schools to safeguard against the

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[24] While it may be true that secular interference under Title I in parochial schools occurs only at the invitation of the parochial scool, many such schools, which must operate on razor-thin budgetary margins, could not afford to refuse substantial governmental support of the secular curriculum, regardless of the degree of governmental control that would accompany the aid. A parochial school that steadfastly refused public support of the secular curriculum even as other neighboring schools accepted such support would soon find itself uncompetitive, in terms of educational quality, tuition fees, or both.

many subtle forms of religious influence on public school teachers in the ineluctably religious environment of a parochial school. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." Lemon v. Kurtzman, 403 U.S. at 619. The ongoing monitoring obligations of the public officials do not diminish simply because the public school teachers are teaching "remedial" rather than "regular" classes. Public Funds for Public Schools v. Marburger, 358 F. Supp. 29, 40 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974). The threat of inadvertent fostering of religion persists no matter what label is attached to the secular course taught by the public school teacher in a parochial school and no matter how carefully public officials have structured

the program. The inherent potential for fostering religion requires constant oversight. Tilton v. Richardson, 403 U.S. at 683. Ironically, the city's obligation to avoid Establishment Clause problems requires the city to assume a watchdog role that, if properly undertaken, itself creates obvious and impermissible entanglement.

Moreover, once Title I funds are made available to a parochial school in the form of an on-premises public school teacher, the parochial school's legal autonomy is seriously compromised. For example, the school's ability to give preference in admissions to children of a particular religion is jeopardized, to say nothing of the degree to which employment practices may mirror church doctrine. At a minimum, the school's ability to influence the religious judgments and activities of both parents and children is severely limited. Thus, the

widely reported practice of one inner-city Chicago parochial school, which receives fully twenty percent of its annual budget in the form of Title I and Title II grants, of requiring its students and their parents to attend mass, and suspending the students for the failure of such attendance of parent or child, can hardly be lawful. See Chicago Tribune, October 28, 1984, Sec. 2, p. 1. It has the direct effect of conditioning a student's access to the federally funded program on the child's and the child's parents' adherence to specified religious practices. Cf. Lemon v. Kurtzman, 403 U.S. at 602 (White, J., dissenting) (government aid to religious schools would violate Establishment Clause if religious instruction required or religious qualifications imposed); 42 U.S.C. § 2000d (prohibition of discrimination on basis of religion in federally funded programs).

The combined effect of the physical presence of governmental officials on the premises of a religious institution and the loss of legal autonomy triggered by the receipt of federal funds, creates an unacceptably high degree of secular intrusion into the religious sphere.

CONCLUSION

As amici have argued, this case is not about whether poor children in parochial schools should receive remedial educational services. The sole issue is whether those services may be provided by a public school teacher who is stationed on the premises of the parochial school itself. Since such a physical inter-mixture of public and parochial education (1) constitutes forbidden aid to a religious institution, (2) creates a risk that religious criteria will affect the secular program, and (3) threatens the

autonomy of the religious institution, it violates the Establishment Clause.

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Nos. 84-237, 84-238, 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, et al.,

Appellants,

v.

BETTY-LOUISE FELTON, et al.,

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,

Appellant,

v.

BETTY-LOUISE FELTON, et al.,

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellant,

v.

BETTY-LOUISE FELTON, et al.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether the plan or program formulated by the New York City Board of Education with funds made available under Title I of the Elementary and Secondary Education Act of 1965 violates the Establishment Clause insofar as it uses such funds to provide teachers and clinical and guidance personnel who are public employees to teach remedial educational courses and to perform supporting services on the premises of church schools for the benefit of the students attending those schools?

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

1. *Introduction*

(a) This counterstatement is based primarily on (1) Defendants' (Appellants') Joint Statement of Material Facts Not in Dispute, submitted to the District Court in connection with appellants' cross-motion for summary judgment (JA 26-73); (2) excerpts from the Evaluation Reports on the various parts of the New York City Title I program for the year 1979-80, prepared at the direction of the New York City Board of Education, and

submitted to the District Court in support of appellants' cross-motion for summary judgment (JA 237-250); and (c) the affidavits of Reverend Monsignor John J. Healy, Secretary of Education and Director of the Roman Catholic Archdiocese of New York, and Reverend Vincent D. Breen, Superintendent of the Roman Catholic Diocese of Brooklyn, which affidavits were also submitted in support of appellants' cross-motion for summary judgment (JA 251-286).

In short, this counterstatement is based on the record in this case as set forth in appellants' documents submitted to the District Court. It is made necessary by the fact that appellants' statements of the facts of record on the present appeals are incomplete, misleading and untrue in critical respects, and, therefore, give the Court an erroneous and distorted view of the program in question, particularly in those aspects that are crucial to the constitutional issue in this case.

2. *The Statute*

Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.* ("Title I")[1] was enacted by Congress in 1965 with the stated policy of providing "financial assistance... to local educational agencies serving areas with concentrations of children from low income areas to expand and improve their educational programs by various means ... which contribute particularly to meeting the special educational needs of educationally deprived children" (JA 27). As defined in the statute, "local educational agency" means a public board of education or other public authority with control over public elementary and secondary schools within a city, town or other political subdivision of a state (*Id.*).

Title I provides for annual appropriations by Congress to support programs approved by local educational agencies, which may include remedial training in reading and mathematics, the teaching of English "as a second language", and special services for the physically handicapped (JA 28). The program in question in this case does not include services for the physically handicapped.

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[1] Replaced, but preserved in all essential features, by the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801-3807.

The statute makes eligible to participate in the programs students (1) who reside in school districts and attendance areas containing a specified concentration of children of families below the poverty level, and (2) who are educationally deprived — i.e., below normal learning levels (*Id.*). Such students are eligible regardless of whether they attend a public or "nonpublic" school, but the statute does not expressly specify whether a program may, and it certainly does not specify that a program must, be administered on the premises of the latter type of school.[2]

3. *The New York City Program*

The local educational agency involved in this case is the New York City Board of Education (JA 27-28). In the program it has formulated ("New York City program"), the funds made available by the federal government are used mainly to pay the salaries of teachers and clinical and guidance counselors who are assigned to teach and provide counseling services in, or on the premises of, "nonpublic" as well as public primary and secondary schools.

(a) *The "Nonpublic" Schools in the Program*

The "nonpublic" schools in the New York City program are virtually all closely associated with a religious organization or faith. Approximately 85% are Roman Catholic parochial schools, and 8% are Hebrew day schools. For that reason, appellees have referred to them as "church-affiliated" or "church" schools, and will do so in this brief.

The religious or sectarian nature of the Roman Catholic schools participating in the program is documented in the previously mentioned affidavit of Reverend Monsignor Healy, the Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York (which includes

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[2] Based on statements in the Congressional Record, this Court has previously come to the conclusion that Title I permits, although it does not require, instruction on the premises of "nonpublic" schools (*Wheeler v. Barrera*, 417 U.S. 402, 422-423 and n. 18 (1974). It should be kept in mind, however, particularly in light of appellant's distortion of the Court's holding in *Wheeler*, that the Court "intimated no view as to the Establish Clause effect of any program", 417 U.S. at 416.

three of the five counties within, or boroughs of, New York City – New York [Manhattan], the Bronx and Richmond [Staten Island]), and also in the previously mentioned affidavit of Reverend Vincent D. Breen, the Superintendent of Education of the Roman Catholic Diocese of Brooklyn (which includes the other two counties or boroughs of New York City, Kings [Brooklyn] and Queens) (JA 251-286).

Both prelates acknowledge that the schools under their jurisdiction are "religiously motivated" (JA 257, 275). They find "unobjectionable" the statement that those schools are "an integral part of the religious mission of the church" (JA 256). The general policies and goals of the schools are set at the diocesan level (JA 257, 275). The religious education provided reflects "a concern that students receive, in their normal educational setting an exposure to the teachings of the Roman Catholic Church and Christianity in general" (JA 259), and that "students be aware of Catholic values and examine those values critically" (JA 261). The school authorities insist that instruction in religion be a part of the regular school day (JA 272).

First preference for available places in the parochial schools participating in the New York City program is given to Catholic children (JA 262). In the schools in Manhattan, Bronx and Staten Island participating in the program, approximately 85.3% of the students are Catholic (*Id.*), and in the schools in Brooklyn and Queens, approximately 92.6% are Catholic (JA 278).

Although the teachers in the parochial schools under consideration are not required to be Catholic, they must, as a condition of hiring, agree "to cooperate with the policies of the school, the religious education value program and the general Catholic atmosphere of respect for each other, for learning and for God" (JA 263). In the Catholic high schools in the Archdiocese of New York, the only schools for which the pertinent statistics appear to be available, approximately 94.5% of the lay teachers are Catholic, and that figure does not take into account the members of the clergy who are teachers (JA 264).

The emphasis or focus in the religious education classes in the schools under consideration is on the teachings of Christianity as the Roman Catholic Church understands them (JA 264, 283).

Participation in these classes by all students is mandatory (JA 265, 282).

There are religious observances and exercises during the regular school day in "most" of the schools (JA 267, 284-285). *Attendance in these activities by all students is also mandatory* (*Id.*). Participation, as opposed to attendance, in some aspects of those activities, however, is forbidden to the non-Catholic students (*Id.*).

Even in secular courses which touch upon morals and values, the teachers "are encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework" (JA 265).

(b) *The Alleged Alternatives*

Before settling on the contours of the present plan of operation of the New York City program with respect to extending the benefits of the program to church school students, the New York City Board of Education claims to have tried, for unspecified periods of time and in unspecified areas, certain alternatives.[3] One was to provide Title I courses for church school students on the premises of public schools, after regular school hours (JA 63). A second was to provide Title I courses for church schools students on the premises of their own schools, also after regular school hours (*Id.*). Both are claimed to have resulted in poor attendance and educational results (JA 64).

A third alternative, admittedly not tried, would have been to provide courses for church school students on the premises of public schools during *regular* school hours. This alternative, it is claimed, was not tried because it might have raised "serious questions" under the New York State Constitution (JA 64). The nature of those questions, however, was never specified by the appellant Chancellor or by any of the other appellants in any

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[3] Appellees believe that the claimed search for, or unavailability of, alternatives is irrelevant, or at least immaterial, to the constitutional issue in this case (see Plaintiffs' Counterstatement of Material Facts Not in Dispute [JA 77]; see also, the opinion of the Court of Appeals [J.S. App., 53a]. It is also for financial reasons, of no practical consequence with respect to the number of economically and educationally deprived students to whom the New York City program is able to extend the benefits of the program.

documentary or testimonial evidence in this case, nor was any explanation offered by any appellant as to why this alternative was not tested in the New York Courts.*

A fourth alternative, also not tried, would have been to provide Title I courses for church school students on "neutral" premises during regular school hours.

If any one of the three alternatives for providing Title I courses to church school students *off* the premises of their schools had been tried, the benefits of the New York City program would necessarily have been extended to those students at their request, or the request of their parents and far more directly (i.e., with far less, if any, substantial intervention or participation by church school officials) than under the present plan.

(c) *The Present Plan of Operation*

Under the present plan, the benefits of the New York City program are extended to church school students on a school-by-school basis, and the selection of the individual students who participate in the program within each church school is in major part made by the church school teachers and principal.

One, but by no means the only, reason for this aspect of the program is a lack of funds which makes it impossible to provide Title I services in all schools, or to all eligible students in those schools in which services are provided. In the school year 1981-82, the last school year for which statistics were available at the time this case was before the District Court, approximately 40,000 students attending church schools in New York City were eligible to participate in the City's Title I program (JA 38). This was 13.2% of the total number of eligible students in all of the schools,

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* Especially in light of the opinion and determination of the Court of Appeals in this case, it would seem that any questions arising under the New York Constitution could hardly have been more "serious" than those arising under the Establishment Clause of the Federal Constitution. It is also not a little inconsistent for appellants to claim that the provision of Title I courses to church school students on the premises of public schools, during regular school hours, raises a question under the State Constitution, while insisting that the present formulation of the New York City program provides courses to church school students in Title I classrooms that are each, allegedly, a veritable "[public] school within a [church] school"!

public or otherwise, in the City (approximately 300,000) (*Id.*). Of the number attending church schools, however, only approximately 20,000 students, or approximately 50% of those eligible, were expected to be able actually to participate in the program (*Id.*)[5].

Because of inflation, moreover, with each passing year, the real (after-inflation) dollars available to the New York City program have been fewer, so that in 1981-82 they were able to provide only approximately 75% of the number of teachers that were in the program eight years before (JA 44).

In actual practice, therefore, neither the students who are eligible to participate in the New York City program nor their parents have any choice as to whether they will actually participate, and those who do so may hardly be said to receive the benefits of the program directly. First of all, they are able to participate only if the school they attend has enough eligible students and is in a location that makes it feasible for the New York City Board of Education to assign teachers and guidance personnel to that school (JA 43). Secondly, in the case of a church school, the program is extended to the eligible students in that school only if requested by the principal (JA 60-61). No request is or may be made by any student or parent (*Id.*)

Thirdly, although the eligibility of each student is established objectively (by residence and the results of standard performance tests [JA 41-42]), the eligible student's actual participation in the program is determined, from among all of the eligible students in the school, by the Title I teachers assigned to the school on the advice of the regular classroom teachers and, on many occasions, the school principals. In the case of a church school, this means that, in actual practice, in the final analysis,

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[5] Although the Chancellor submitted no comparable statistics for the eligible students attending public schools, the number of those students who did not participate in the New York City program in 1981-82 must have been well over *100,000*, based on the *per capita* formula for allocating the available Title I funds used by the New York City Board of Education. The formula results in the allocation of funds for services to be provided to students in church schools according to the ratio of such students to all eligible students, whether in public or church schools (JA 43). The particular significance on these statistics is explained below.

the student's participation is in major part determined by the church school teachers and principals (JA 237-50 [the cited pages of the Joint Appendix contain pertinent excerpts from the Evaluation Reports on the New York City Board of Education for the school year 1979-80, the latest available at the time this case was before the District Court]).

(d) *The Courses*

The New York City program provides courses in remedial reading of two types: the first, for students in *all* grades of elementary and secondary school whose reading is at least one year below their grade level; and the second, for students in grades four to eight whose reading achievement is as much as five years below grade level (JA 45).

Courses in remedial mathematics are provided in *all* grades to students whose grasp of the subject is at least six months below grade level (*Id.*).

English as a second language is also taught in *all* grades to enable students who do not speak the language well enough (*Id.*), and here appellees quote from the Secretary's appeal brief, "to achieve the competency . . . necessary for them to participate effectively in regular instructional programs". Of course, the entire New York City program, in all its parts, has a similar basic purpose — to enable the students participating in the program to achieve learning levels that will enable them to keep up with their classmates in all of the courses taught in the schools participating in the program, which, of course, in the church schools include religious courses.

The clinical and guidance services in the New York City program are available only to students who participate in the other parts of the program, and are intended to help them by providing counseling to the students and their parents on special problems that might affect the students in their courses (JA 45-46).

(e) *The Teachers and Counselors*

The teachers and counselors in the New York City program are regular salaried employees of the New York City Board of Education and are similar in all professional respects to their fellow employees who teach and provide counseling services in or in

connection with the regular classroom courses in the City's public schools (JA 47-48). They are hired, paid and assigned to the church schools by the Board of Education (JA 47). Their assignment, however, is on a purely voluntary basis, ensuring that they all have a favorable approach to performing services in church schools (JA 48).

The applications for assignment contain no question concerning the applicants' religion, so that there is no basis for knowing to what extent the applicants who are accepted and assigned to church schools share the same faith as the schools to which they are assigned (JA 49)[6].

Although, as noted above, Title I personnel are assigned to the schools in which they perform services by New York City Board of Education officials, if they are assigned to church schools, they are assigned to rooms within those schools selected by the church school principals, and the hours of their classes and counseling conferences are fitted into the regular school schedule by the principals (JA 240).

Although Title I personnel do not necessarily teach or perform counseling services five days each week at the same school, or confine their services to one school, it is only reasonable to assume that finances, logistics and other administrative considerations dictate that, to the fullest extent possible, they perform their services in the same school as much as possible.[7]

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[6] Despite this admitted fact, appellants insist on stating that the relative handful of affidavits made by teachers in the program assigned to church schools, and submitted by the Chancellor to the District Court "demonstrate that the vast majority of [Title I] teachers work in nonpublic schools with religious affiliations different from their own" (S.Br. 49). Even if this unwarranted claim were true, it would not support the proposition that it reduces the potential for their inhibiting or even aiding the religion of the church schools, and it certainly would not support the proposition that it reduces the potential for administrative entanglement between Title I and church school personnel!

[7] The statistics furnished by the Chancellor and cited by appellants to support the allegation that Title I personnel are "itinerant" fall far short of doing so. The Chancellor has confined himself to offering the single statistic that "[d]uring the 1981-82 school year approximately 78 percent of all Title I teachers and other professionals spent less than five days a week at the same nonpublic school and worked in more than one nonpublic school"(C.Br. 8). This establishes that approximately 22% of the Title I personnel did in fact (cont. next page)

Although Title I teachers and counselors assigned to church schools are instructed that they are accountable to, and subject to the supervision of, only their Title I supervisors, and that they are solely responsible for virtually all aspects of the Title I program as administered in the church schools, they spend far less time with their Title I supervisors than with the church school teachers and principals, and they appear to give far less attention to their instructions than to the advice and recommendations of church school personnel (JA 237-250).[8]

The Title I teachers and counselors assigned to church schools confer regularly with both the church school teachers and principals concerning all aspects of the Title I program (JA 237-250). The Title I teachers decide with the church school teachers (and to a lesser extent with the church school principals) who from among the students eligible to participate in the program shall actually do so (JA 239, 240, 242, 244). The Title I personnel also accept referrals made to the clinical and guidance services by the church school teachers and principals (JA 237, 239, 245, 248, 249). Sometimes the Title I teachers and church school teachers jointly request clinical and guidance services (JA 245).

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[7] (cont.)spend all of their working time in the same church school. It makes no distinction between teachers and clinical and guidance personnel, and thereby suggests that the percentage would be substantially higher for teachers, since it is acknowledged that clinical and guidance personnel ordinarily spend only one or two days at a school (JA 58). In any event, "less than five days a week" may mean four days, or at least three, which hardly makes the teachers who perform services regularly during that number of days at the same school "itinerant". Lastly, the alleged fact that the Title I teacher or counselor is "itinerant" hardly decreases the potential for administrative entanglement between him or her and the church school official.

[8] The Title I personnel are instructed, among other things, that they are solely responsible for the selection from among the students eligible to participate in the Title I program those who will actually participate; that they are not to allow any Title I equipment, materials or supplies to be diverted for use in the regular instructional program of church schools; that they are not to engage in team-teaching or cooperative instructional activities with church school teachers; that they are not to become involved with the religious activities of the church schools, and that they are not to introduce any religious matter in their teaching (JA 50-51).

The Title I teachers "find out what the classroom [church school] teachers are teaching and/or coordinate lessons" (JA 240). They confer with the church school teachers to ascertain the specific needs and weaknesses of the Title I students in regular classroom studies in order to be able to help the students in those studies (JA 243). The public school teachers also help directly with regular classroom studies (JA 237). The Title I clinical and guidance counselors work with the church school teachers "in formulating comprehensive treatment plans" (JA 249). The Title I counselors and church school teachers use a "team approach" (JA 250).[9]

(f) *The Equipment, Materials and Supplies and The Classrooms and Other Service Areas*

To insure that the instructional equipment, materials and supplies used in the New York City program on the premises of church schools will not be used in or in connection with the religious courses of the schools, all items are labeled as the property of the New York City Board of Education as being for use in the Title program (JA 57). When they are not in such use, they are supposed to be locked in storage and filing cabinets, to the extent they will fit into such cabinets, and, as noted above, instructions to that effect are given to the Title I teacher*(Id.)*.

A further requirement or condition of extending the New York City program into a church school is that any and all rooms in that school used by Title I teachers and clinical and guidance counsellors in the performance of their services must be "free" of religious statues, symbols, pictures and artifacts (JA 58). This includes not only the classrooms set aside for courses taught by Title I teachers, but also the nurses' rooms and comparable

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[9] Appellants in their briefs studiously avoid referring to this constant, daily administrative contact between, and material assistance given to each other by, Title I personnel and church school personnel, especially that involving the church school principals, which is described in the Evaluation Reports as "an ongoing dialogue" (JA 238). Instead, appellants attempt to divert attention to what they call, and what may well be, the "routine" administrative contact between Title I officials and church school officials with respect to the processing of applications by the latter for Title I aid in their schools.

facilities used by the Title I counselors *(Id.)*.

(g) *The Supervision of Title I Personnel*

In the New York City program, one field supervisor is "ordinarily" responsible for supervising the work of 22 Title I teachers (JA 53). He can, therefore, do little more than to "attempt" to make "at least one unannounced visit to each teacher each month" *(Id.)*. The primary purpose of this occasional "unannounced" visit is to evaluate the teacher's performance as such – i.e., in the Title I classroom *(Id.)*.

With respect to the "unannounced" nature of these monthly visits, it should be noted that a Title I class consists of *ten or less* children in addition to the teacher (JA 51). The supervisor, therefore, may be "unannounced" before he walks through the door of the classroom, but he is hardly so thereafter when presumably, among other things, he is checking to see if the teacher is injecting any statements of a religious nature into the classroom instruction.[10]

Assuming the monthly visit of the supervisor to be a form of surveillance of the type calculated to uncover any violation by a Title I teacher or clinical or guidance counselor in matters within the purview of the Establishment Clause, there is not an iota of evidence in the record of this case of any such surveillance of any Title I teacher or counselor outside of a classroom or other Title I facility on (or off) the premises of a church school. In particular, there is no evidence in the record of any surveillance of any of the many regular conferences between and among Title I personnel and church school teachers and principals. There is also no evidence in the record of any form of interrogation of any Title I teacher or counselor, or any church school student, parent, teacher or principal, concerning any possible violation by a Title I teacher or counselor of his or her instructions in

[10] It is claimed that other governmental representatives make an unspecified number of "occasional" or "periodic" visits to Title I classrooms on the premises of church schools, although it is acknowledged that some of these sporadic visits are made "to monitor the extent to which the program goals...are being achieved" (JA 54).

Establishment Clause matters, or concerning any statement or conduct on the part of any church school teacher or principal that would tend to induce any such violation.

There is not the slightest reference in any of the Evaluation Reports for 1979-80 to any such matter, or any indication that any author of any such Report was concerned about it, or asked any question of any Title I personnel on the subject (JA 237-250). It also seems clear from the Reports that the authors did not interview or question any church school personnel about any matter, whether relating to the Establishment Clause or otherwise (*Id.*).

In 1984, as the result of an incident involving the Chancellor of the New York City Board of Education then in office, the New York City Department of Investigation undertook an examination of the Board of Education on a system-wide basis. Upon the conclusion of that examination, in September 1984, the Commission of the Department of Investigation issued a report stating that –

> "...The Board's mechanisms to prevent or uncover misfeasance or malfeasance are grossly inadequate. As it is presently constituted, the Board of Education's oversight components simply do not provide the kind of effective self-policing clearly needed." ("The Board of Education of the City of New York, A Review of Management Controls, Conclusions and Recommendations", [September, 1984], p. 2).

It is small wonder, therefore, that there has been no reported instance of a violation of the requirements of the New York City program which would constitute the clearest violations of the Establishment Clause – i.e., the requirement that no Title I teacher or counselor assigned to a church school become involved in the religious activities of that school, or inject religious matter into classroom instruction or counseling, and the corollary requirement that no church school principal or teacher try to exert pressure on a Title I teacher or counselor to ignore his instructions in such matters (JA 53, 55).[11]

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[11] As noted above, there seems to be substantial evidence in the Evaluation Reports of violations by Title I teachers and counselors of these instructions in related matters, such as the joint selection of students participating in (cont.)

(h) *The Success of the Program*

Nothing in the foregoing statement of facts is intended to indicate that the New York City program is not a good or successful program educationally, and, more specifically, that it has not contributed substantially to the educational needs of educationally-deprived children. The fact remains, and the statistics of record demonstrate, that it could continue to be as successful educationally, and to help as many educationally -deprived children, if it were redesigned to eliminate that portion of the program in operation on the premises of church schools.

As noted above, in the school year 1981-82, the last school year for which pertinent statistics are available in the record of this case, the federal funds available to the New York City program enabled the program to reach only approximately 20,000 of the approximately 40,000 eligible students attending church schools, and only the same percentage of the approximately 260,000 eligible students attending public schools (pp. 6-7, *supra*). If, therefore, the program were redesigned to eliminate that portion in operation in church schools, there would be more than enough eligible students attending public schools (who live in the same school districts and come from the same economic background as the eligible students attending the church schools) for whose benefit the funds used to finance the eliminated portion could be spent. In short, there would not be the slightest diminution in the total number of educationally deprived children whose needs the redesigned program would meet.

4. *The Procedural Background of this Case*[12]

Since its enactment in 1965, Title I, or programs instituted under the statute, have continually been under challenge in the

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(cont.)
the Title I program in conjuction with church school personnel, coordination of teaching activities with church school teachers, and "team" teaching and counseling. As will be noted below, moreover, the presence or absence of actual violations by individuals in the program is not a proper basis for determining the constitutionality of the program.

[12] This brief review of cases leading up to the present case is not set forth as legal argument, but merely to lay the factual groundwork for such argument.

federal courts. The statute and the New York City program were almost immediately challenged in *Flast* v. *Cohen*, 392 U.S. 83 (1968), as violating the Establishment Clause of the First Amendment by reason of the operation of the New York City program on the premises of church schools (J.S. App. 61a). The only issue resolved in that case, however, was the right of plaintiffs in the case to sue as taxpayers (Id.). After that issue was finally resolved by this Court, the case lay dormant while other cases of a similar nature worked their way up to the Court.

Title I was challenged again in *Wheeler* v. *Barrera*, *supra*, but when that case came before this Court in 1973, no program instituted under the statute was before the Court except a Missouri program which was under attack because it did *not* operate on the premises of church schools, and the issue of the constitutionality of the statute, or a program operating on such premises, was expressly left undecided by the Court until such time as a case involving such a program should come before it (417 U.S. at 426).

In the same term of the Court as *Wheeler*, however, a case involving a New Jersey statute, providing, among other things, for the use of state funds to provide teachers to conduct remedial education courses on the premises of church schools, came before this Court for review in *Public Funds for Public School* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *summarily aff'd*, 417 U.S. 961 (1974). In that case, the decision of a three-judge court finding the New Jersey statute unconstitutional was summarily affirmed by this Court.

Then, a case involving a Pennsylvania statute providing, among other things, for a program similar to that in *Marburger* came before this Court in *Meek* v. *Pittenger*, 421 U.S. 349 (1975). The Pennsylvania statute was found to be unconstitutional by the Court on the ground that it presented a potential for administrative entanglement between church and state, and on the additional ground of potential political entanglement (421 U.S. at 372).

Shortly after *Meek*, and based explicitly on this Court's determination in that case, a new case was instituted challenging Title I and the New York City program, *National Committee for Public Education and Religious Liberty (PEARL)* v. Harris, 489

F. Supp. 1248 (S.D.N.Y), *appeal dismissed for want of jurisdiction*, 449 U.S. 808 (1980). In *PEARL*, which was decided by a three-judge court in the Southern District of New York, the statute and program were held to be constitutional (J.S. App. 102a-103a), but the case never came before this Court because of the failure of the would-be appellants to file their appeal papers in timely fashion.

Even before PEARL was decided in the lower court, the present case was brought by a group of taxpayers in the Eastern District of New York. It, too, was explicitly based on *Meek*, an allegation concerning which appears in the complaint (JA 11). It was stayed by the District Curt while PEARL was pending (JA 14-15) and thereafter decided on the basis of the opinion of the three-judge court in PEARL (J.S. App., 55a-57a). The District Court was unanimously reversed by the Court of Appeals for the Second Circuit, which deemed itself bound by *Meek*, although it identified several other considerations calling for the same result (J.S. App. 53a). Now, in the final days of 1984, this case places squarely before the Court, for the first time since the enactment of Title I, the issue of the constitutionality of a plan or program instituted under the statute which provides teachers and counsellors to teach remedial education courses and perform support services on the premises of church schools.

SUMMARY OF ARGUMENT

A

Neither the national program set forth in Title I nor the New York City program is at stake in this case. Limiting that program to public schools will not prevent it from assisting as many students as it is now assisting. No such limitation will deprive any student attending a church school of any "equal opportunity". As any other child living in New York City, a student attending a church school has the equal right and opportunity to attend a public school of the City. There is no substantial question in this case concerning the Equal Protection Clause or the Free Exercise Clause. What is really at stake is the future of the Establishment Clause.

B

The brief language of the Establishment Clause may at times be difficult to apply, but there are precedents in the present case

that are closely in point. Appellants' resort to general principles of law and their quotation from opinions of this Court in inapposite cases should not be allowed to divert the Court's attention from those precedents. Appellants' reliance on the recent decisions of this Court in cases arising under the Establishment Clause is misplaced.

C

1. The constitutionality of the New York City program is best determined under the three-part test developed by this Court in recent years. The program has a secular legislative purpose. It has, however, the primary effect of both advancing and inhibiting religion, as well as the potential for excessive entanglement.

2. The program has the primary effect of inhibiting religion in that: (a) it requires all participating church schools to strip all religious symbols from the walls of all classrooms and other facilities before they may be used for Title I purposes; (b) it requires all participating students to accept instruction from public school teachers only; and (c) it inevitably tends to induce religious and sectarian organizations to become, or appear to become, less religious or sectarian in order to participate in the program.

3.a. The New York City program also has the primary effect of advancing religion. The cases in point strongly support that proposition. They hold that a government loan of instructional equipment and materials to a primary or secondary school with a predominantly sectarian purpose inevitably aids the religious function of the school, which cannot be sufficiently differentiated from the secular function. A distinction has been made in the case of textbooks, of a secular nature , loaned directly to the students of such a school, on the theory that the contents of a textbook are ascertainable in advance and, once they are ascertainted to be secular, the textbooks cannot aid the religious function of the school. On the other hand, it has been repeatedly stated that the contents of a teacher's instruction are not ascertainable in advance. Accordingly, there would seem to be no distinction between instructional equipment and materials and the instruction provided by a teacher, once placed in the environment of a sufficiently sectarian primary or secondary school.

b. A teacher presents an *a fortiori* case. He is at the core of the educational process. This is particularly so in the case of the

remedial teacher because of the degree of his students' dependence on the remedial instruction for use in all other subjects. Additionally, a teacher who is well respected or well liked improves the image of the school in which he teaches in the minds of his students. If he is a Title I teacher assigned to a church school, he lends the prestige of the government to the church school. This is the reverse of the procedure held impermissible in *McCollum v. Board of Education*, 33 U.S. 203 (1948), in which religious teachers were allowed to conduct classes on the premises of public schools, but the principle is the same insofar as the government may be said to be lending its prestige to a religious organization.

c. The Title I teacher is also of substantial aid to the regular classroom teacher and to the church school principal. The Title I teacher is effectively a member of the church school faculty. He also aids all of the regular classroom students who would be held back in their courses if their slowest classmates were not given remedial instruction in the Title I courses.

d. It is no answer to say that all of such aid would be available if the Title I program were conducted on the premises of public schools or on neutral sites. If that were so, there would be no excuse for the present program. Appellants themselves have pointed out that one of the substantial benefits derived from an on-premises program is the close working relationship that arises between the Title I teacher and the church school personnel, which is "impossible" to achieve in an "off-premises" program (J.S. App. 8a; see also, S. Br. 9). Also, in an "off-premises" program, a Title I teacher would not be in a position to improve the image of, or lend the prestige of government to, the church school.

e. The Roman Church parochial schools participating in the New York City program are sufficiently sectarian to bring into operation the rule set forth in paragraph 3a above. That conclusion is warranted by the affidavits of the prelates submitted by appellants to the District Court and by the description of the Roman Catholic parochial schools in the opinions of this Court in the prior cases in point. The affidavits show, among other things, that in the parochial schools in the New York City program, all students, no matter what their faith, must attend

religious classes and participate in religious exercises and observances during some part of every school day: The affidavits also show that over 85% of the students and the lay teachers are members of the Catholic faith.

f. It does not save the New York City program that benefits provided by the program are ultimately enjoyed by the participating students. That is so in any program. The aid in this program does not flow "directly" to the students. It is provided to the schools in the program on a school-by-school basis. It is provided to a church school only if and when requested by the principal of that school, and may not be requested by a student. Even when provided to a school, it is not necessarily given to all of the eligible students in the school, since there are not enough funds available to bring the benefits of the program to all eligible students. Selection of the participating students from among the eligible students is made by the Title I teacher in cooperation with the regular classroom teachers and the church school principals.

g. It also does not save the New York City program under the primary effect test that there is allegedly no evidence of constitutionally impermissible conduct by Title I teachers. Under the applicable rule (see para. 3a above), the advancement of religion derives from the ordinary services of the Title I teachers and counselors when rendered on the premises of the sectarian institution.

D

1. The New York City program has the potential for excessive entanglement. The potential for excessive entanglement is sufficient to condemn the program. Proof of actual entanglement is not necessary, and appellees do not have such burden in this case. The potential arises in a program of the type in question from the interaction of the Title I teachers and guidance counselors and not from any supervision. The classes, meetings, conferences and discussions in and outside the Title I classroom are virtually impossible to monitor under any system of surveillance that would enable the officials of the New York City program to be reasonably certain that there is substantially no constitutionally impermissible conduct. Any such system of surveillance would have to be so oppressive as to create more controversy and, therefore, even more entanglement.

2. There is no such system of surveillance in operation in the New York City program, and there never has been. There is only a limited amount of *supervision* consisting of sporadic visits by Title I supervisors to the Title I classrooms in church schools. The main purpose of these visits is not to check on any constitutionally impermissible conduct on the part of the Title I teacher, but rather on his competence as a remedial teacher. This is demonstrated by the annual Evaluation Reports concerning all parts of the program which do not make any reference to the subject of constitutionally impermissible conduct. They also do not indicate that the authors conduct any interviews or interrogation of any of the church school personnel. There is no indication in the record of any surveillance of the constant interaction between the Title I teachers and counselors and the church school teachers and principals.

3. The alleged lack of any constitutionally impermissible conduct in the operation of the New York City program can be explained by (a) the lack of any real system of surveillance, or (b) the lack of any willingness on the part of any participant in the program to compromise the program or the participant, and (c) the fact that, throughout the history of its existence, the program has been under attack in the courts, and all interested parties have been awaiting a determination of this Court concerning the program's constitutionality.

4. In addition to the potential for excessive administrative entanglement arising out of the interaction of Title I personnel and church school personnel, there is also a potential for excessive political entanglement. Appropriations under the Title I statute are voted upon annually by Congress. There has been little controversy concerning the amount or allocation of funds because the opponents of the national program take the position that it is being administered unconstitutionally to the extent that it permits any allocation of funds to any local education agencies for the purpose of providing teachers, counselors, equipment or materials to church schools or for the benefit of students attending those schools.

5. Even if there were no evidence of any actual constitutionally impermissible conduct or controversy in connection with the New York City program in the past, that would be no justification for disregarding the potential for such conduct and controversy in

the future. Within the last few years there has been a substantial change, not only in this country, but also throughout the world, in the amount and intensity of religious controversy.

E

There is no more reasonable line to be drawn in this case than the one already drawn by the Court of Appeals, which would prohibit any public funds to be used to provide publicly employed teachers or counselors to perform services on the premises of church schools. There is no reasonable distinction to be made between remedial and other secular education on a constitutional basis. There is also no such distinction to be made between "supplemental" and other secular education, as suggested by the Secretary. Under these circumstances, if the determination of the Court of Appeals is not affirmed, there is good reason to believe that the "genie will be out of the bottle."

ARGUMENT

THE NEW YORK CITY PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE EXTENT THAT IT USES FEDERAL FUNDS TO PROVIDE TEACHERS AND CLINICAL AND GUIDANCE PERSONNEL TO TEACH REMEDIAL EDUCATION COURSES AND TO PROVIDE SUPPORT SERVICES ON THE PREMISES OF CHURCH SCHOOLS TO THE STUDENTS ATTENDING THOSE SCHOOLS

A. What Is At Stake In This Case

It should be made clear what is and what is not at stake in this case. What is *not* at stake is the national education program here called "Title I." This is so procedurally as well as substantively. It was determined in the District Court, at the insistence of defendants and intervenors, now appellants, that the sole issue in this case should be whether or not the New York City program is constitutional. As a result, the determination of the Court of Appeals is confined to a declaration that the program is unconstitutional, and the Court of Appeals has offered appellants the opportunity to revise the program and to continue it in operation (J.S. App. 54a).

If this Court affirms the decision of the Court of Appeals, therefore, this Court need not strike down the statute, or terminate the New York City program, or even reduce the number of students participating in the program. As noted above in the counterstatement of the case, if the funds available to the program are not used for the benefit of students attending church schools, they can be put to full use for the benefit of an equal number of students attending public schools in the same areas.[13]

That transfer of benefits does not deny "equal opportunity" to the students attending church schools. In *Everson v. Board of Education*, 330 U.S. 1 (1947), Mr. Justice Black, speaking for a majority of the Court, which upheld New Jersey's right to provide free transportation to such students, made it clear that the Court did "not mean to intimate that a state could not provide transportation *only to public schools*" (330 U.S. at 17, appellees' emphasis). Mr. Justice Rutledge, in his dissent, pointed out that if a state did so, it would not discriminate against students attending private schools in a constitutional sense because - "[t]he child attending the private school has the same right as any other to attend public school (330 U.S. at 58).[14]

The existence of that right, moreover, distinguishes this case from *Brown v. Board of Education*, 347 U.S. 483 (1954). In that case, black students who had chosen to exercise the right were held to have been deprived of equal opportunity, or, more precisely, equal protection of the laws, because the separate *public* schools they were forced to attend were not equal in nature to the public schools that white students were allowed to attend.

In any event, any argument based on deprivation of equal opportunity in a case of this type has been rejected by this Court:

> "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution. Having

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[13] See p. 14, *supra*

[14] Mr. Justice Jackson, dissenting, noted that – "The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them" (330 U.S. at 221).

> held that tuition reimbursements violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program" — (*Sloan v. Lemon*, 413 U.S. 825, 834 [1973]).

The same applies to any argument based on the Free Exercise Clause:

> "It is true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clause,...and that it may often not be possible to promote the former without offending the latter" (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 [1973]).

What is really at stake in this case, therefore, is the future of the Establishment Clause.

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools" (Rutledge, J., dissenting in *Everson*, 330 U.S. at 63).

In the present case, in the practice of providing public funds for public school teachers to teach in church schools, we are in the presence of the second of those great drives, in high gear.

B. Some Further Preliminary Observations

Appellees are not unaware that, as a general proposition, the brief language of the Establishment Clause may at times be difficult to apply. On the issue now before this Court, however, there are a substantial number of precedents, close in point, that can be utilized as guidelines, cases in which public funds were used, or proposed to be used, to provide textbooks, instructional equipment and materials, and even teachers and counselors, to church schools or directly to students attending them. It was those precedents by which the Court of Appeals adjudged itself to be bound (J.S. App. 53a).

Appellants' attempt to denigrate reference to such precedents as if it were a blind resort to "fixed, *per se* rules", their own reliance on broad, general concepts of "neutrality" and "accomodation" and their snatching of bits and pieces out of the context of opinions of this Court in inapposite cases strongly suggest that they hope to persuade the Court to disregard the precedents. Appellants also apparently see, or think they see, in the most recent decisions of the Court a tendency in that direction. Appellees prefer to believe that at least two of those case are *sui generis*, and the third, although it relates indirectly to the matter of government aid to church schools, has little or nothing to do with aid at the core of the educational process of those schools.

Appellees refer to *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), and *Mueller v. Allen*, 103 S. Ct. 3062 (1983). The precise issues in those cases are worth noting in order to demonstrate how distant they are from those in the case at hand. In *Lynch*, the issue concerned a Christmas display, including a creche, in a public square, which had been sponsored by a municipality and a retail merchants' association. In *Marsh*, the question was the propriety of the practice of opening sessions of a state legislature with an invocation by a minister; in *Mueller*, the propriety of an income tax deduction for expenditures incurred by taxpayers in connection with the education of their children at public or private schools.

As noted, *Lynch* and *Marsh* have nothing at all to do with the use of public funds to aid church schools or their students. Both are explainable by the reluctance of a majority of the Court to invalidate well-established national traditions, one dating back to the First Congress. *Marsh* was decided in major part on the basis of a practice adopted in the First Congress, and the decision in that case virtually stands as an exception to the Establishment Clause (103 S.Ct. at 3333-3334).

As also noted, *Mueller*, the tuition tax deduction case, does relate to government aid to the parents of students attending church schools, but it is far removed from the use of government funds to provide teachers in those schools. It will be discussed in more detail below.

C. The New York City Program Has the Primary Effect of Both Advancing and Inhibiting Religion

Appellees assume, as apparently appellants also do, that, particularly in this type of case, this Court will apply the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971):

> "First the statute [or plan, program or practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, [it] must not foster an excessive government entanglement with religion."

The Court has not sustained any statute, plan, program or practice that has failed to pass each part of this test, except in *Mueller, supra*, where, as noted above, it virtually carved out an exception to the Establishment Clause.

Appellees do not challenge the fact that the New York City program has a secular purpose. We vigorously challenge, however, its constitutionality under the remaining two parts of the three-part test.

In this case, the Court of Appeals declined to pass on the validity of the New York City program under the primary effect test because, in its opinion, the program was clearly invalid under the entanglement test (J.S. App. 47a-48a). It suggested, however, that "[a] fair case could ... be made, on the record before us that government funding of the City's Title I program constitutes a direct and substantial advancement of religious activity..."(Id.). Appellees respectfully submit that the use of the word "fair" is an understatement, and that, as James Madison long ago foresaw, government intervention into the sphere of religion can at the same time - and in this case does - inhibit as well as advance religion (Madison, Memorial and Remonstrance, Par. 6. The "Remonstrance" is set forth in full in the appendix to Mr. Justice Rutledge's dissenting opinion in *Everson, supra*, [330 U.S. at 63-72]).

(1.)*The New York City Program Has the Primary Effect of Inhibiting Religion*

It is a prerequisite of the program in question that every room in a church school in which a Title I teacher or counselor is to

perform services must be stripped of all religious statues, pictures, symbols or artifacts that ordinarily adorn its walls or other parts (JA 58).

If it could not be presumed that religious symbols serve a substantial purpose in the Roman Catholic religion, the requirement of the New York City program with respect to such symbols would be proof enough. The requirement, moreover, clearly defeats that religious purpose, and thereby inhibits religion.

It is also a precondition of the New York City program that the instruction and support services provided under the program may be provided only by Title I teachers and counselors, who are public school teachers and public education employees. Yet it is well established by this Court that –

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children *by forcing them to accept instruction from public school teachers only" (Pierce v. Society of Sisters*, 268 U.S. 510, 530 [1925]; appellees' emphasis).[15]

The requirement that Title I courses must be taught by public school teachers, especially when coupled with the condition that the public school teachers must not inject any religious matter into their instruction, also deprives students attending church schools from having the benefit in Title I courses of any religious

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[15] It is ironic that appellants argue, on the strength of *Pierce v. Society of Sisters, supra*, that invalidation of the New York City program will allegedly violate the Free Exercise Clause, on the theory that it will place a burden on the exercise by students attending church schools of their constitutional right to do so – i.e., it will require them to forego instruction in the remedial courses provided by the New York City program unless they attend public schools. As noted above, this argument has been rejected (pp. 23-24, *supra*). Yet appellants fail to recognize that the main condition imposed by the program they seek to save imposes the same burden, in only a somewhat lesser degree – i.e., it requires students attending church schools for the purpose of receiving instruction from church school teachers under the administration of church school authorities to forego instruction in the remedial courses provided by the New York City program unless they accept instruction in those courses from public school teachers supervised by public school authorities (and, if we are to believe appellants, "in a [public] school within a [church] school!)

exercises, observances, instruction or comments that their "regular classroom" (church school) teachers are free to engage in, and undoubtedly do engage in, during their courses.[16]

As Mr. Justice Brennan noted in his concurring opinion in *Early v. DiCenso*, 403 U.S. 602 (1971), the record in that case disclosed that one of the church school teachers receiving a salary supplement for teaching secular courses under the Rhode Island statute invalidated in that case had, because of the requirements of the Rhode Island Constitution, given up the practice of saying a prayer in each of his classes (403 U.S. at 650). Mr. Justice Brennan described that evidence as "a concrete testimonial to the self-censorship that inevitably acccompanies state regulation of delicate First Amendment freedoms" *(Id.)*. The only difficulty appellees have with the Justice's comment is the reference to the censorship as being *"self-censorship", when it was in fact mandated by the Rhode Island Constitution (and is, in the present case, mandated by the New York City program).*

There remains the most serious way in which the New York City program inhibits religion. It apparently arises from the success church-connected colleges and universities have had in defeating Establishment Clause challenges to federal grants or loans in their favor on the strength of the argument that they are not "pervasively sectarian" (see, particularly, *Hunt v. McNair*, 413 U.S. 734 [1973]).

On the basis of that argument, appellants in this case set out to prove, through, among others, the chief officials of the Roman Catholic parochial school system in New York City that the schools in that system participating in the New York City program are not "pervasively sectarian" (JA 251-286). The District Court, by adopting the opinion of the three-judge court in *PEARL v. Harris, supra*, agreed (J.S. App. 87a-88a). The Court

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[16] It should be remembered that over 90 % of the lay teachers in the Catholic parochial schools in this case appear to be Catholic, and that this percentage does not take into account the *clerical* teachers whose existence appellants acknowledge only by their reference to lay teachers as such, and whose numbers were not offered at all, although surely a matter of diocesan record.

of Appeals, looking at the same record (all based on documentary, as opposed to testimonial, evidence) came to the conclusion that the schools in question were at least sufficiently sectarian to make their inclusion in the program in question a violation of the Establishment Clause (J.S. App. 44a-50a).

Elsewhere, appellees will argue that the Court of Appeals' conclusion was eminently correct (*infra*, pp. 38-40). The point made here is that it is an inevitable tendency, in cases of this type, for church schools desirous of receiving government financial assistance, directly or indirectly, to make themselves, or make themselves appear to be (which has the same effect, though to a lesser degree), less sectarian — i.e., less religious — than they would otherwise be.

As noted above, that tendency, resulting from a dependence of the church on the state, in any form, financial or otherwise, was a concern of Madison. As noted by Mr. Justice Brennan, it has also been the concern of many devout men:

> "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government. It has rightly been said of the history of the Establishment Clause that 'our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism of a Roger Williams' " (Brennan J., concurring in *Schempp*, 374 U.S. at 259-260).

It is difficult to conjure up a better example of the tendency towards secularization resulting from dependence on government than the process that appears to be at work in cases of the present type.

2. *The New York City Program Has the Primary Effect of Advancing Religion*

A brief review of the pertinent cases is necessary to show the precedents in support of this point, the line that has emerged between the permissible and impermissible forms of aid, the basis for the line, and appellants' misunderstanding of that basis.

In *Everson*, *supra*, the Court debated the issue of free public transportation for students attending church schools, as well as public schools, in terms of whether or not the free transportation provided church school students had the primary effect of advancing religion. As has been often noted since, the bare majority that saw the free bus fares as not advancing religion recognized them as "approach[ing] the verge" of the state's constitutional power (330 U.S. at 16; see also, *Committee for Public Education v. Nyquist*, 413 U.S. 756 [1973]).

Except for the determination of the Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), decided over 20 years later, and perhaps even despite *Allen*, the description of *Everson* remains substantially accurate today, at least in the field of primary and secondary education. *Allen*, of course, permitted public funds to be used to lend free textbooks, of a secular nature, directly to church school students, as well as to public school students. The theory, however accurate or inaccurate, behind *Allen* was "that the content of textbooks can be ascertained in advance and [once ascertained] cannot be diverted to sectarian uses" (*Wolman v. Walter*, 433 U.S. 229, 251, n.18 [1977]). As will be seen, that theory sets secular textbooks apart from teachers (unascertainable in advance and divertible) and from instructional equipment and materials (neutral, but divertible). It also places the last two items in essentially the same category (divertible) and is an important element in appellees' position under the primary effect test.

Allen also stands for the proposition that government aid to church schools is less likely to aid religion if it flows directly to the students of the schools rather than to the schools themselves (392 U.S. at 243-24).

As noted above, the three-part test was formulated in *Lemon*, *supra*, which came before this Court in 1971, and in which the government aid at issue involved teachers. To be sure they were church school teachers, and the aid was not in the form of their assignment, but in the form of salary supplements paid to the teachers (as in *Early v. DiCenso*, 403 U.S. 602 (1971]) or reimbursements for teachers' salaries paid to the church schools (as in *Lemon*). The permissibility of the aid, moreover, was not determined under the primary effect test, but only under the entanglement test. Nonetheless, a critical determination for the

purposes of the primary effect test would seem to have been made in the subsequently oft-repeated conclusion, differentiating textbooks from teachers that –

> "[in] terms of potential for involving some aspect of faith or morals in secular subjects, *a textbook's context is ascertainable, but a teacher's handling of a subject is not*" (403 U.S., at 617, repeated in *Levitt v. Committee for Public Education*, 413 U.S. 472, 481 [1973] and also in *Committee for Public Education v. Regan*, 44 U.S. 646, 650 [1980]; appellees' emphasis).

As noted above, this theory places teachers in a quite different category from secular textbooks.

Although, *Tilton v. Richardson*, 403 U.S. 672 (1972), was decided on the same day as *Lemon*, appellees pass over it, as we also pass over *Hunt, supra*, and *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), on the premise that all three cases involved colleges and universities, rather than the primary and secondary schools under consideration in the present case, and the Court has clearly fashioned different rules regarding aid to institutions of higher learning.

In *Committee for Public Education v. Nyquist*, 413 U.S. 734 (1973), the Court did not go beyond *Allen*, or, for that matter, *Everson*, in striking down three programs under the primary effect test: (1) annual grants to church schools, on a per student basis, for maintenance and repair of buildings to ensure the students' health and safety; (2) reimbursements to parents of children attending church schools, and (3) tax deductions for such parents. In *Nyquist*, Mr. Justice Powell, for the majority, described the "channel" through which some forms of aid might trickle to the secular side of a church school, without being deemed direct aid to the sectarian, as "a narrow one" (413 U.S. at 775).

On the same day as *Nyquist*, the court struck down another tuition reimbursement scheme in *Sloan v. Lemon, supra*, and also a New York program for the reimbursement of church schools for certain costs of administering tests "mandated" by the State, but prepared by the church schools – *Levitt, supra*, (*Levitt* I). As indicated above, it was in *Levitt* I that textbooks were contrasted with teachers. It surfaced in *Levitt* I because the tests involved in that case were "teacher-prepared", rather than standardized, and it was felt by all of the Justices, except Mr. Justice

White, that such involvement required the program of reimbursements for administering the tests to be deemed impermissible under the entanglement test. Subsequently, when that element was removed and the issue related to reimbursements for administering standardized tests, the reimbursements were deemed unobjectionable. *Wolman v. Walter*, 433 U.S. 229 (1977), and *Regan*, *supra*.

At this point, appellants pass over *Wheeler*, *supra*, already discussed, where this Court held it would decide the constitutionality of Title I when a plan had been formulated under the statute and had come before the Court.

In *Marburger*, *supra*, decided in 1974, the issue of government aid to church schools involving teachers came before this Court once again, actually, in this instance, in substantially the same form as in the present case – the assignment of teachers, employed and supervised by local, public school boards, to church schools for the purpose of teaching remedial courses. The aid was provided pursuant to a New Jersey statute which was held unconstitutional under the entanglement test. The District Court, however, repeated the characterization of the contents of a teacher's instruction made by this Court in *Allen*, *Lemon* and *Levitt*, although without any comparison in this instance to textbooks – "[a] teacher's instruction may vary in content or emphasis and is not entirely predictable..." (358 F. Supp. at 40). This Court affirmed summarily (417 U.S. 961).

Thus, *Marburger* once again distinguishes teachers from secular textbooks, without making an explicit comparison.

In *Marburger*, aid in the form of instructional equipment and materials was also found by the District Court to be impermissible, but those findings were also based on the entanglement test.

Meek, *supra*, in 1975, brought to this Court for consideration substantially the same forms of government aid to church schools as those in *Marburger*, this time provided under an Ohio statute: (1) loans of secular textbooks to church school students; (2) the provision of instructional equipment and materials to church schools; and (3) the assignment of teachers and counsellors, employed and supervised by local, public educational agencies,

directly to church school students for remedial instruction and counseling on church school premises.

The Court declared the loan of textbooks permissible on the strength of *Allen* (421 U.S. at 362). Its conclusion with respect to the loan of instructional equipment was that it is impermissible under the primary effect test, but the conclusion was based on two grounds: (1)the fact that the loans were made directly to the church schools, and (2) the nature of those schools, which was the critical factor:

> "The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman*, 403 U.S., at 616-617. *Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.* '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. *Within the institution, the two are inextricably intertwined.*' For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity" (421 U.S. at 366; appellees' emphasis)

Thus, as noted above, the "intertwined" secular and religious functions of the church schools were fatal to the aid in the form of the instructional equipment and materials, even though the latter were "neutral."

The Court then found that the assignment of teachers and counselors, although directly to the church school students, was invalid under the entanglement test, expressly putting aside the question of whether they were also invalid under the primary effect test (421 U.S. at 369).

In *Wolman, supra*, a new Ohio statute, "obviously an attempt to conform to the teachings" of *Meek* (see 433 U.S. at 233), made the instructional equipment and materials *available directly to church school students* in the form of a loan, as in the case of the textbooks. This Court, however, once again found the aid to be impermissible, this time solely on the second ground set forth in the majority opinion in *Meek*. As stated in the majority opinion in *Wolman*, despite the new form of the aid, directly to the students –

> "The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. *In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the school*" (433 U.S. at 250).

Under *Wolman*, therefore, it is clear that aid is impermissible, as having the primary effect of advancing religion, when it places such items as instructional equipment and materials on the premises of church schools, the religious and secular functions of which institutions are "intertwined". And this is so regardless of whether the aid is granted or loaned to the church schools or to the students of those schools.

The Ohio statute in *Wolman* also provided aid to students attending church schools in the form of the services of diagnosticians and therapists. Appellees will defer consideration of those aspects of the statute until discussion of the entanglement test which appears below.

Lastly, in *Mueller, supra*, aid in the form of tax deductions to parents for expenditures on account of the education of their children once again came before the Court, as it had in *Nyquist, supra*. On this occasion, however, a majority of the Court distinguished the Minnesota statute in Mueller from the New York statute in *Nyquist* on the ground that the provisions in the Minnesota statute were "parts of a genuine system of tax laws" (rather than a direct tuition reimbursement) and theoretically available to all parents whether their children attended public or private schools. Mr. Justice Rehnquist, for the majority, commented that:

> "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated

> financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case" (104 S. Ct. at 3069).

It is at least clear that the aid in *Mueller* is far removed from the educational process. The aid in the present case is at the center of it.

From *Everson* to *Mueller*, therefore, the only forms of government aid to church schools at the primary and secondary level, or to their students directly, that have been held to be permissible are: (1) free bus fares for the students; (2) the loan to the students of secular textbooks; (3) the reimbursement to the church schools of expenses incurred in performing specified "mandated" services such as administering and reporting on standardized tests on secular subjects; and (4) the provision to the students of diagnostic health services on the premises of the church schools, and of therapeutic services *off* those premises.

Even more critical are the forms of aid that have been declared impermissible by this Court, particularly instructional equipment and materials. No reasonable distinction in terms of permissibility can be drawn between those items and instruction and counseling by teachers and counselors. *If instructional equipment and materials, once placed on the premises of church schools, must inevitably aid the religious aspects of education at those schools because of the intertwining of the religious and secular aspects, then the instruction and counseling given by teachers and counselors placed on the same premises would have the same or much greater effect.*

Actually, as the procedures employed in the New York City program demonstrate, there is possibly a way to ensure that instructional equipment and materials will not be used in aid of the religious function of the church school. They can (as when not in use in Title I classrooms for Title I purposes) be kept under lock and key. They are thus placed in the same category as secular textbooks. Teachers and guidance counselors, however, cannot be placed under lock and key.

In comparison to textbooks and instructional equipment and materials, the part that the teacher plays in the education process

is enormous. It may well be said that the teacher is education "personified", in the literal as well as the figurative sense. He or she is one half of the teacher-pupil relationship, which Mr. Justice Rutledge, in his dissent in *Everson* noted, is "[n]ow and always the core of the educational process" (330 U.S. at 48).

The teacher involved in the New York City program moreover, instructs on no esoteric subjects: rather, he or she furnishes the building blocks of all knowledge – reading and arithmetic and the English language. Perhaps more than any other teacher, the one who engages in remedial instruction is truly at the dead center of "the core of the educational process". Without such instruction there *is* no such process, for the child who cannot read, or read or speak the English language well enough, cannot properly study any other subject in the curriculum of the church school, including the courses in religion and those in which religious principles and morals are involved.

The teacher of grade and high-school years is more than one half of the educational process to the student: he is not only education "personified"; he is often the school "personified". If he is admired and respected by his students, that admiration and respect is transferred to the school in which he teaches. The Title I teacher also lends to the church school the prestige of the State. As has been noted by this Court in numerous Establishment Clause cases, when that prestige is placed behind religion, it does not merely influence young students; it has a coercive effect on them (*Engel v. Vitale*, 370 U.S. 421, 430-431 [1962]; *Abington School District v. Schempp, supra*,, 374 U.S. at 221 [1963]; Brennan, J., concurring in *Schempp*, 374 U.S. at 260).

In this respect, *McCollum v. Board of Education, supra*, and *Zorach v. Clauson*, 343 U.S. 306 (1952) are instructive. As Mr. Justice Brennan pointed out in his concurring opinion in *Schempp, supra* –

> "The deeper difference [between the two cases] was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the same position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not."

* * *

> ". . . the Constitution does not permit that prestige and capacity for influence of the religious teacher to be augmented by investiture of the symbols of authority at the command of the lay teacher for the enhancement of secular instruction" (374 U.S. at 263).

The situation in the present case is, in one way, the reverse of that in *McCollum* in that, here, the New York City program places the Title I teacher in a church school classroom in precisely the same position as the regular classroom teacher. The fact remains that "the prestige and capacity for influence of the religious teacher [read: church school]" is now "augmented by investiture of the symbols of authority at the command of the lay teacher for the enhancement of [religious] instruction."

The placement of the Title I teacher on the premises of the church school by no means aids that school only symbolically. As noted in the counterstatement of the case in this brief, the Title I teacher also aids the regular classroom teacher by helping the latter to understand the problems and the solutions to the problems of the Title I students, and the way to reintegrate the student into his or her regular course of study.

Given the nature of remedial instruction and the necessity for constant communication between the remedial and the regular classroom teacher, it may fairly be said that the two are closer together, at least in the educational process, than any two members of the church school faculty. In effect, therefore, the Title I teacher, at least the one who teaches three or more days on the premises of a church school, becomes a member of the church school faculty. He or she is thus not only at the center of the core of the teaching process as that process is reflected in the relationship between teacher and student, but also as it is reflected in the relationship between teacher and teacher and teacher and principal.

The Title I teacher also aids all of the regular classmates of the Title I students in the church school by enabling them to move ahead in their studies instead of being held back by the Title I student.

It is no answer to what has been said that the same would be true if the Title I teacher and guidance counselor were to

perform their services off the premises of the church school. Appellants have insisted, and they have fashioned an argument, on the proposition that such services are quantitatively and qualitatively different from those performed "on premises". This is so principally because of the close working relationship that develops between the Title I teacher and the regular classroom teacher (and church school principal) when the Title I teacher is "on premises."

If the Title I teacher, moreover, were to perform his services "off premises", whatever admiration and respect he might inspire in his church school students would hardly be transferred to the church school; nor would he lend the prestige of the state to the church school.

It is also no answer to the foregoing argument to say that the church schools in this case are not "pervasively sectarian," so that placing a teacher on the premises of such a school does not necessarily aid the religious function of the school because of the intertwining of that function with the secular. Appellants repeatedly refer to a 10-point profile which they insinuate this Court has adopted with respect to primary and secondary church schools. This Court, however, does not seem to have done so — certainly never in *Meek* or *Wolman* — and when appellants are done insinuating otherwise, they admit as much (I. Br. 36). There is no excuse for their distortion of the opinion of Mr. Justice Stewart in *Meek* in this respect. Thus, they state that his characterization of the parochial schools in that case was made "in the context of schools" that fitted the 10-point profile (*Id.*). The 10-point profile, however, appears only in that part of Mr. Justice Stewart's opinion in which he describes and quotes from the *complaint* in Meek, *without approval* (421 U.S. at 371-372).

The closest that Mr. Justice Stewart comes in his *Meek* opinion to setting forth a profile as the basis for the determination of the majority of the Court is when he notes that the "purpose of many of [the schools involved in the case] is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief." He then concludes that "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole... *and*

inescapably results in the direct and substantial advancement of religious activity, ..." (421 U.S. at 366).[17]

This passage from Mr. Justice Stewart's opinion in *Meek* was quoted in *Wolman* by Mr. Justice Blackmun, on behalf of a majority of the Court, immediately before he announced the determination of the majority that the loan of instructional equipment and materials, even though made directly to the children attending the Roman Catholic parochial schools of Ohio, was impermissible *under the primary effect test* (433 U.S. at 249-250).

Actually, in *Wolman*, the parties had stipulated to a "profile" of those parochial schools that, if anything, shows them to be less sectarian than the parochial schools involved in the present case (433 U.S. at 234):

> "It was also stipulated that, if they were called, officials of representative Catholic schools would testify that such schools operate under the general supervision of the bishop of their diocese; that most principals are members of a religious order within the Catholic Church; that a little less than one-third of the teachers are members of such religious orders; that 'in all probability a majority of the teachers are members of the Catholic faith'; and that many of the rooms and hallways in these schools are decorated with a Christian symbol. *Id.*, at 30-33... Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities, and no teacher is required to teach religious doctrine as a part of the secular courses taught in the schools" (433 U.S. at 224)

As noted in the counterstatement of the case in this brief, the Roman Catholic parochial schools in this case more than fit the stipulation in *Wolman*. To begin with, they discriminate to a substantial extent in their admissions policy, giving first preference

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[17] At this point, the aid to which Mr. Justice Stewart is referring in *Meek* is the loan of instructional equipment and materials, but, as noted above, it is appellees' position that the same principle applies, *a fortiori*, to aid in the form of teachers and guidance counselors.

to Catholics in the parish. They also place restrictions on the appointment of faculty members, if only to choose those who are basically in sympathy with Catholic principles and moral values. As noted above, Reverend Monsignor Healy indicates that well over 90% of the lay teachers in the high schools of his diocese are Catholic, and that figure does not take into account the clerical teachers.

Most importantly of all, the officials of the parochial schools in this case require *all* students, no matter what their faith, to attend religious classes and to participate in religious exercises and observances, and they see to it that such exercises and observances take place on every school day.

Lastly, the parochial schools in this case are located in a state in the northeastern part of this country, many of them in well-populated cities, and a substantial number in the "inner cities" of those cities. Thus, they would appear to be little different from the Roman Catholic parochial schools of Pennsylvania and Ohio involved in *Meek* and *Wolman*. As the Court of Appeals pointed out in the present case—

> "It would be simply incredible, and the affidavits [of Reverend Monsignor John J. Healy and Reverend Vincent D. Breen] do not aver, that all, or almost all, [of] New York City's parochial schools receiving Title I aid have in Justice Brennan's words in *Lemon*, *supra*, abandoned the religious mission that is the only reason for the school's existence" (J.A. App. 48a).

As noted above, appellants are aware that the cases in which the concept behind the phrase "pervasively sectarian" was developed, *Tilton*, *Hunt* and *Roemer*, *supra*, especially the last named, suggest a profile that might, in some respects, be more sectarian than that of the parochial schools in this case, but, as also noted, the cited cases all related to colleges and universities, to which this Court has applied different standards than to primary and secondary schools in cases involving aid permissible under the primary effect test, standards which are substantially more lenient in allowing the aid, and, therefore, require a profile that is substantially more sectarian before aid will be declared impermissible. *Wolman*, moreover, was decided by this Court after *Tilton*, *Hunt* and *Roemer*.

Appellants also argue that the aid in this case is saved by the alleged fact that it flows *directly* to the students participating in the New York City program. This is simply not true. Appellees do not deny that the assignment of Title I teachers and counselors benefits the students in the program considerably, and, as does any educational aid, whether or not it comes through the students' school or directly to the students, the aid here ultimately *benefits* the participating students directly (along with others), but it hardly flows to them directly in the way that has been deemed to save other aid.

In this respect, of course, *Allen* is the leading case. It is clear, however, that the textbooks involved in *Allen* went directly to the students in a very real sense. First of all, they had to be requested by the students, although the request could be passed on by an official of their school (392 U.S. at 255). More importantly, on receipt, each book truly became the unique property — on a "loan" basis — of the student. It was his to read by himself and otherwise to use and control without having to share with anybody else.

Quite obviously, this is not so with respect to the Title I teacher, who is not, and may not be, requested by any student or group of students, and whose assignment, schedule and movements are never controlled by any student or group of students. Even his instruction is shared among all the students and not by any one. In this respect, he is much more like the instructional materials and equipment in *Wolman* than the textbook in *Allen*.

Even though, moreover, the Ohio statute that finally came before this Court in *Wolman* had been amended to provide that the materials and equipment should be loaned directly to the students, the amendment did not save the statute (433 U.S. at 250). Also, even though the Pennsylvania statute in *Meek* provided that the "auxiliary services", including the remedial and counseling services to be performed by public employees, should flow directly to the church school students, that did not save those services from being determined to be impermissible (421 U.S. at 367).

The tax deductions in *Mueller, supra,* are distinguishable from the Title I teachers in the present case. First of all, they are far removed from the educational process. Secondly, as Mr. Justice

Rehnquist noted, whether and to what extent those deductions are taken are matters completely within the control of the taxpayers. Lastly, the fact that they may be taken by parents of children attending public as well as private schools does not save the aid in this case because the latter aid is available on that same basis. In *Meek*, this Court would not sanction the aid provided by the Pennsylvania statute with respect to teachers or instructional materials and equipment, even though it construed the statute to be part of a legislative scheme to grant like aid to all students, whether they attended public, private or church schools (421 U.S. at 367-368), since other legislation or appropriations had previously provided the same aid to children attending public schools.

In sum, it seems clear on the basis of *Meek* and *Wolman*, and the reasoning of a majority of the court in each of those cases, concerning the impermissibility of the aid provided in those cases in the form of instructional equipment and materials, that the aid provided in the present case in the form of instruction by teachers and support services of clinical and guidance counselors is equally impermissible as having the primary effect of advancing religion.

Appellants' final argument against the applicability of the primary effect test in this case is based on the allegation that there is no proof of any deliberate constitutionally impermissible conduct on the part of the Title I teachers or counsellors in the New York City program. Appellees will deal with the accuracy of that allegation below. Here it is pertinent only to note that this Court in *Meek* and *Wolman* did not require any such proof in determining that government loans of instructional equipment and materials are invalid under the primary effect test, relying solely on the predominantly sectarian nature of the church schools and the intertwining of the religious and secular functions of those schools. If, however, appellees were to point to any particular conduct on the part of the Title I teachers or counselors, in connection with the primary effect test, it would be the establishment of their close working relationship with the regular classroom (church school) teachers and principals which inevitably aids the church school personnel, particularly the regular classroom teachers, in *all* of their courses, and, specifically, in reintegrating the Title I students into all of those courses.

D. The New York City Program Has the Potential For Excessive Entanglement

It will be necessary to review once again some of the cases in point, but here only insofar as they bear upon the entanglement test, and, particularly, the nature of that test, and the point at which it has been applied.

As noted above, in *Lemon* and *DiCenso, supra,* this Court applied only the entanglement test to strike down the Rhode Island and Pennsylvania statutes there before it, providing for salary supplements to, and reimbursements for, teachers employed by church schools.

The Court clearly did so on the face of the statutes, *i.e.*, the plans or programs formulated in the statutes (White, J., dissenting, 403 U.S. at 664). It saw in both plans or programs several potential evils - (1) the potential referred to above concerning the possibility of the teacher's injecting "some aspect of faith or morals in secular subjects" (403 U.S. at 616); (2) the potential of controversy between public education personnel and church school personnel; and (3) the potential of political controversy. The emphasis on potentials is clear and abundant:

> "But what has been recounted suggests the *potential* if not actual hazards of this form of state aid (403 U.S. at 618; appellees' emphasis).
>
> * * *
>
> "But the *potential* for impermissible fostering of religion is present (403 U.S. at 619; appellees' emphasis).
>
> * * *
>
> "The *potential* divisiveness of such conflict is a threat to the normal political process" (403 U.S. at 622).

The Court had evidence of the actual experience of the Rhode Island program, which it accepted as true, but which it rejected as a basis for determining the constitutionality of the program. Thus, both the majority and dissenting opinions alike note (1) that several teachers participating in the Rhode Island program had testified in the District Court to the effect that they had injected no religious matter into their secular course instruction (403 U.S. at 666-667); and (2) that the District Court had found

as fact that "concern for religious values did not inevitably or necessarily intrude into the content of secular subjects" (403 U.S. at 667).

The Court also noted that "[t]o ensure that no trespass occurs, the State has ... carefully conditioned its aid with pervasive restrictions" (403 U.S. at 619). The Court, however, refused to rely on those restrictions. It held that "[a] *comprehensive, discriminating and continuing* state surveillance will inevitably be required" which would itself "involve excessive and enduring entanglement between state and church" (403 U.S. at 619).

Marburger added two new elements. Under the New Jersey program there in question: (1) the teachers were no longer employees of the church schools and under the latter's supervision, but *employees of the local, public boards of education* and supervised by those boards; and (2) the instruction was remedial. Yet the three-judge court that struck down the program still found that the potential for fostering religion and for provoking administrative and political controversy (358 F. Supp. at 40-42). The Court also made its determination on the face of the New Jersey statute without benefit of any actual experience of the operation of the state program.

As noted above, this Court nevertheless affirmed the District Court's determination summarily.

Meek, therefore, was not the first case in which this Court was faced with public funding of publicly employed teachers giving remedial instruction on the premises of church schools. In any event, a majority of the Court reaffirmed all that was stated and held in the majority opinion in *Lemon, supra*. It particularly reaffirmed the statement that had appeared in the majority opinion in *Lemon*, and had been repeated in the District Court's opinion in *Marburger*, that "[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion. 403 U.S., at 619" (421 U.S. at 371; appellees' emphasis).

The majority expressly found and concluded:

> "The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially

> eliminate the need for continuing surveillance....But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained....The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present" (421 U.S. at 371-372).

Although there was "an evidentiary hearing" before a three-judge court in *Meek*, the Pennsylvania statute and program appear clearly to have been decided facially.

Although the Ohio program under consideration in *Wolman*, *supra*, provided aid to students attending church schools in the form of the services of diagnosticians and thereapists, the majority opinion in *Wolman* once again reaffirmed the determinations of the Court in *Marburger* and *Meek*. Under the Ohio program, the diagnosticians performed their services on the premises of the church schools (433 U.S. at 241), whereas the therapists performed services *off* the premises (433 U.S. at 244-245).

In holding that it was permissible for the program to provide for diagnosticians to perform their services "on premises", the majority of the Court drew a distinction between diagnostic services and teaching based on the fact that the former "have little or no educational content and are not closely associated with the educational mission of the nonpublic school....Second, the diagnostician has only limited contact with the child..." (433 U.S. at 244).

With respect to the therapists under the Ohio program, there was no issue with respect to their performing services "on premises", the only question being whether, if they performed their services at "neutral" publicly-owned locations (off the premises of public, as well as church schools) they should be allowed to attend exclusively to church school students on any one or more of such sites. The Court held that they could do so since "[t]he dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils" (433 U.S. 249).

It was the clear line drawn by *Marburger*, *Meek*, and *Wolman* that persuaded the Court of Appeals in the present case that it was bound to declare the New York City program unconstitutional (J.A. App. 53a). The same line was seen by the majority of the Court of Appeals in *Americans United for Separation of Church and State v. School District of the City of Grand Rapids*, 718 F.2d 1389 (6 Cir. 1983). As the majority said in response to the dissent: "It [the dissent] cites no instance (because there is none) where the Supreme Court has approved expanding public tax funds for teachers to teach *in parochial schools*" (718 F.2d at 1407; *emphasis in original*).

Appellants seek to find distinctions in the precedents where none exist, and, suspecting that there are none they ask the Court to overrule *Meek* (and presumably *Marburger*, *Wolman*, and much of the Court's reasoning in *Lemon*) (S. Br. 40, n. 32). Appellees will here answer their arguments not answered elsewhere.

1. It has already been noted in the counterstatement of the case at the beginning of this brief that appellants claim that no "entanglement" is possible in the New York City program because the relationship between public or government and religious authorities is limited and routine (S. Br. 33; I. Br. 43). As also noted, any such observation completely ignores the key personnel in the program, who are the Title I teachers and counselors and who have a close relationship with the church school students, teachers and principals. The *potential* for controversy is in that relationship, and, obviously, if it exists there, it will quickly spread to higher levels.

2. In the same vein, appellants argue that no entanglement is possible in the program because the only "supervision" is that of public school employees (the Title I teachers and counselors) by public school officials (the Title I supervisors, coordinators and higher officials) (I. Br. 44-45). This also ignores the close, daily communication between Title I teachers and counselors and the church school students, teachers and principals, and the fact that entanglement does not arise only out of "supervision" of one group by another, but also, and more likely, out of any interaction between two groups (421 U.S. at 372, n. 22)

In this respect, *Wolman*, cited by Intervenors, is completely inapposite. As noted above, the program in *Wolman* did not involve public school teachers performing services on the premises of church schools, in daily contact with church school personnel, but only diagnosticians who only occasionally visited the church schools, and therapists who performed their services "off premises".

3. Appellants' "school-within-a-school" theory is an obvious superficial attempt to conform to *Wolman* and proves too much. If it is impermissible to place a public school teacher on the premises of a church school, it is all the more impermissible to place an entire public school on such premises. In any event, the alleged "school-within-a-school" theory does not lessen the communication between Title I teachers and church school students, teachers and principals. It also leaves out the Title I counselors who perform their services in the church schools' nurse's room or comparable facility.[18]

4. Remaining is appellants' main argument, which is based on the alleged actual experience in the operation of the New York City program between the time it first went into operation and the time this case came before the District Court. In this particular argument, appellants seek to grab hold of their own bootstraps in order to throw themselves over the hurdle of the precedents.

Despite their culling of quotes from the opinion of the Court of Appeals, that opinion hardly finds that the New York City program involves active and extensive surveillance or that such surveillance has achieved its purpose. Rather, a close examination of the opinion under consideration will demonstrate that it actually credits the program with the only "surveillance" that is shown to exist on the record, which is no real "surveillance"

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[18] The short answer to appellants' persistent reference, usually in footnotes, to *Nebraska State Board of Education v. School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161, *cert. denied*, 409 U.S. 921 (1972), is that it represents a unique, emergency situation; it was never decided by this court; and in any event it preceded *Meek*, in which Mr. Justice Brennan, who is quoted by appellants for his explanation of his vote against granting certiorari in *Hartington*, voted with the majority of the Court.

at all, but merely an "attempt" on the part of overworked Title I supervisors to visit each Title I teacher once a month. Thus, as the Court of Appeals noted when it specifically referred to the record on "surveillance" – "The visits of the Title I supervisors are sporadic and, while unannounced, are not unnoticed" (J. A. App. 39a).[19]

Those visits are the only "surveillance," and they are not even intended to be surveillance, but rather supervision for the purpose of evaluating the teacher's instruction from an educational viewpoint. As the Court of Appeals pointed out – "These visits do not disclose what goes on in the frequent contacts between the regular and the remedial teachers (or other professionals)" (J. S. App. 39a). More importantly, they do not, and *they cannot possibly*, disclose what goes on every day in the month between the Title I teachers and counselors and the church school students.

Appellees understand *impossibility*, when coupled with the injunction that the State must be reasonably *"certain"* that there is no impermissible fostering of religions, to be the key to the surveillance that Mr. Justice White has described as creating a "paradox". We take *Meek* to mean that, in the context of a program such as the one in question in this case, where the State places its employees on the premises of church schools, virtually no amount of surveillance will suffice to assure certainty, and, if attempted, is bound to produce the very controversy and entanglement that the State should have avoided in the first instance.

Appellants and those who constantly seek loopholes in the Establishment Clause, and in the efforts of this Court to maintain the full strength of that Clause, apparently have interpreted *Meek* to hold that, no matter what the danger or potential for impermissible conduct in any plan or program, it can be made to pass muster by building in the proper degree of surveillance or appearance of surveillance. As so many of such arguments, it proves too much, and would, if accepted, permit many, if not

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[19] Intervenors do not fully quote, and thereby distort, the concluding sentence of the same paragraph of the opinion (I. Br. 38; cf. J.S. App. 39a) At the end of its opinion, the Court of Appeals noted that "nothing in the record shows that surveillance under New York City's plan is significantly different from that contemplated by the Meek Court...."

most, of the programs, plans and practices this Court has struck down under the Establishment Clause.

Just as the "surveillance" conducted under the New York City program is a sham, so is the alleged absence of any impermissible conduct. Indeed, it is clear that the absence of the one can easily account for the absence of the other. As the Court of Appeals has pointed out, not one of the participants in the New York City program is apt to "turn himself or herself in", and the largest, most important, most impressionable group of participants in the plan, the students, undoubtedly would not be able to detect conduct that was impermissible under the Establishment Clause if carried on in their presence.

As noted in the counterstatement of the case, moreover, several other significant facts of record serve to account for the alleged absence of impermissible acts in the record. The first is the fact that during the entire period of time it has been in operation, the New York City program has been in the courts under attack as unconstitutional. That alone would tend to mute conduct and controversy on both sides. Secondly, there is *Meek* and the other precedents on which appellees more than reasonably relied, as witness the decisions of two Courts of Appeals. Appellees saw no need to encumber the record and to waste their slender resources on proof of specific acts when the precedents advised them that they need only prove the contours of a plan which demonstrated a judicially recognized potential sufficiently great to warrant rejection on its face.[20]

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[20]Appellees' position, adopted by the Court of Appeals, serves to answer appellants' argument that the Court reversed the burden of proof in this case. Such is not the fact. Appellees met that burden under *Meek* and the other precedents when they laid before the Court the contours of a plan which, on its face, created a sufficient potential for excessive entanglement. They did not even attempt to meet the burden that would have been imposed by appellants' theory – i.e., before a plan may be held to be invalid under the entanglement test, it must be shown to have actually generated controversy or constitutionally impermissible conduct. This being so, in much the same way as the Secretary has asked the Court to override *Meek* and the other precedents should the Government prove to have been wrong, appellees ask the Court to remand this case in order to give them an opportunity to develop a record on the true, actual experience of the New York City plan should they prove to have been wrong.

Up to this point, appellees have addressed themselves only to the question of potential administrative entanglement. There is, however, as great a danger of political entanglement. To date, as appellants argue, the appropriations allocated to the New York City program, as extended to church schools, have been relatively small – if $20,000,000 is small. If, however, the reasonable line drawn by the Court of Appeals is not maintained, the amount of government aid that can, and will undoubtedly, flow to the church schools for avowedly secular courses will be much larger; at least, the pressure to increase that flow will be much stronger, and it may reasonably be foreseen that it will generate more controversy, not only in Congress, but also in the State legislatures, than any previous controversy of that type in the history of this country.

So much for the potential, which, as noted, is what the precedents are based on. It should be noted once again that funds for the local Title I programs are raised by annual appropriations voted in Congress. Those appropriations, which have remained relatively small while this case has been working its way up to this Court, have in fact been regularly and vigorously opposed by many organizations (over 20 alone, united in the Committee for Public Education and Religious Liberty). As also noted above, however, that opposition has been confined to the constitutionality of Title I, and sharp controversy has been muted by the willingness of both sides to await the decision of this Court. If that decision permits appropriations to continue, without limitation as to church schools, there will clearly be much more vigorous opposition, especially as the amount of appropriations increase, and, as noted, the controversy spreads to State legislatures.

Appellees are not unaware of the statements in the most recent opinions of a majority of this Court in *Lynch* and *Mueller*, *supra*, to the effect that the question of political entanglement may only arise in cases where there are "direct financial subsidies paid to parochial schools or to teachers in parochial schools" (103 S. Ct. at 3071, n. 11.). The matter under consideration in neither of those cases, however, involved annual legislative appropriations, as does Title I. We submit, therefore, they are not proper vehicles for a precise determination between the situation

in which a legislative body determines the issue of appropriating funds to pay the salaries of teachers hired by church schools or teachers hired by local, public educational agencies to teach in church schools, at least from the point of view of political controversy and entanglement. On that basis, we respectfully submit that the issue has yet to be decided in a case of the present type, and that, if it is decided here, it should not be on the basis of the slight, entirely formal difference between programs, plans or practices having precisely the same ends.

In concluding, appellees note that appellants have, in all courts, insisted on the proposition that determinations in cases of this type necessarily call for the drawing of lines. Appellees submit that the only reasonable one has been drawn by the Court of Appeals, one which would prohibit government aid for the teaching of any secular courses in church schools. Actually, it is the line in *Wolman*. It should be held fast.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorney for Appellees

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Nos. 84-237, 84-238 and 84-239

In the Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, ET AL., APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

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1. Appellees' brief is striking—almost brutal—in its candor. They acknowledge (Br. 15) that New York City's Title I program is a "good and success-

ful" program that "has * * * contributed substantially to the educational needs of educationally deprived children." They do not seriously dispute (see Br. 6-7) the unanimous opinions of the courts below that, to be effective in reaching educationally deprived children attending private schools in New York City, remedial instruction must be provided on the premises of the private schools. Since, in their view, the Establishment Clause prohibits New York from conducting such an (effective) program, the solution is neat and simple. New York City, they say with aplomb, should simply end the attempt to provide remedial instruction to private school students (Br. 15, 23):

> If * * * the program were redesigned to eliminate that portion in operation in church schools, there would be more than enough eligible students attending public schools (who live in the same school districts and come from the same economic background as the eligible students attending the church schools) for whose benefit the funds used to finance the eliminated portion could be spent. In short, there would not be the slightest diminution in the total number of educationally deprived children whose needs the redesigned program would meet.
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> * * * * *
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> As noted above * * *, if the funds available to the program are not used for the benefit of students attending church schools, they can be put to full use for the benefit of an equal number of students attending public schools in the same areas.

But this disregard for the interests of poor and educationally deprived children who happen to be attending nonpublic schools wholly ignores the fact that

Congress has made a dramatically different judgment. Congress has repeatedly determined that it is the national policy that *all* children should have equal access to this program, whether they attend public or private school. More specifically, Congress has *required* (and nothing in the judgment below invalidates the requirement) that children attending private schools be provided Title I services " 'comparable in quality, scope and opportunity for participation to those provided for public school children with needs of equally high priority' " (*Wheeler* v. *Barrera*, 417 U.S. 402, 407 (1974); see 20 U.S.C. 2740(a), 3806(a); 34 C.F.R. 200.70, 200.71). Accordingly, if the judgment below is affirmed, appellees' suggestion that children in private schools be expelled from the Title I program cannot be followed. Rather, the New York City Board of Education will be required to provide nonpublic school children off-premises Title I services comparable to the on-premises services provided to public school children.[1] This will, as the court of appeals recognized (J.S. App. 52a), result in substantially more expensive, less effective, services for fewer needy children. The consequences of the ineffectiveness may well be borne by the private school children alone; the increased cost, however, will be allocated to the entire Title I program. See Gov't Br. 10 n.8. The record shows that some 5,000 children would be forced

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[1] Experience suggests that, as an educational matter, off-premises programs may never be fully comparable in quality to on-premises programs. The reasons for this are set forth in detail, with citations to record evidence, in our opening brief (at 9 & n.6, 10-11 n.9). Appellees assert (Br. 38) that the "principal[]" reason why on- and off-premises programs are qualitatively different is the "close working relationship" between Title I and regular teachers under the on-premises approach. In fact, although not insignificant, this factor is far less important than other reasons, such as transportation cost and safety factors, student and teacher fatigue, poor attendance, conflicts with other activities, and stigma.

out of the New York City Title I program each year because of the increased noninstructional costs imposed by the judgment below (J.S. App. 8a-9a, 72a-73a; J.A. 66-67). Because Title I primarily serves public school students, most of those displaced would be from public schools.[2]

In any event, Congress has decided—and appellees expressly concede (Br. 26)—that it is a wholly secular purpose to provide vital remedial educational assistance to *all* disadvantaged school children, private and public, who would not otherwise receive it. Whether or not this is constitutionally required (see *id.* at 23-24), Congress's determination that this is what *fairness* demands—that supplementary educational programs designed to counteract the effects of poverty and funded by all taxpayers should be extended to eligible children without regard to whether they have chosen to attend a private school—should not be casually overridden.

2. Appellees depart in large measure from the abstractions that led the court of appeals to strike down this program without even analyzing "the considerable evidence concerning [its] actual working" (J.S. App. 37a). They attempt to persuade this Court that —contrary to the view of court of appeals (*id.* at

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[2] The Secretary has interpreted the "comparability" requirement of Title I to require that expenditures for instructional services and arrangements for eligible public and nonpublic school children be equal (consistent with any special educational needs) and that the costs of general administration and transportation be allocated to the program as a whole. See, *e.g.*, Decision of the Commissioner, *In re Norfolk, Virginia School District (Title I Elementary & Secondary Education Act, Bypass)*, No. OA-11 (Dec. 10, 1979); see also S. Rep. 95-856, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. 95-1137, 95th Cong., 2d Sess. 32 (1978). Accordingly, the increased transportation and other noninstructional costs associated with an off-premises program for private school children would divert resources that would otherwise be used for both public and nonpublic school children.

52a)—the program in fact *has* done "detectable harm." They do so by culling miscellaneous bits of evidence, not credited or found significant by the two district courts that examined the facts, and pasting them together with speculations not supported (and in some instances contradicted) by the record.[3] Appellees' idiosyncratic account of the operations of this program completely ignores the elaborate findings made by two district courts, findings that were not questioned by the court of appeals. A few examples will suffice.

a. Appellees assert (Br. 7) that the benefits of Title I "are extended to church school students on a school-by-school basis" and that "the selection of the individual students who participate in the program within each church school is in major part made by the church school teachers and principal." These statements are inaccurate.

Eligibility for Title I services is determined on the basis of public school attendance areas and individual measures of educational deprivation. J.A. 39-42. If a public school attendance area is determined to be eligible (a determination made on the basis of the concentration of low-income children in the area), then any child living within that area, whether he

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[3] At the same time, appellees dismiss as mere allegations or claims facts that were so found by the courts below. See, *e.g.*, Appellees' Br. 6-7 (questioning whether New York had actually tried the alternatives discussed by court of appeals at J.S. App. 7a-9a and the *PEARL* court at J.S. App. 71a-73a); Appellees' Br. 10 & n.6 (questioning the evidence concerning Title I teachers' religious affiliation, discussed by the court of appeals at J.S. App. 12a and the *PEARL* court at J.S. App. 74a); Appellees' Br. 49 (characterizing as "alleged" the absence of documented instances of impermissible conduct by Title I teachers, noted by the court of appeals at J.S. App. 13a, the district court at J.S. App. 56a, and the *PEARL* court at J.S. App. 85a, 91a, 92a).

attends public or private school, is eligible for participation in Title I provided he is "educationally deprived," *i.e.*, performs at a level below normal for his age (34 C.F.R. 200.3(b)). Eligibility is thus determined entirely on the basis of the child's residence and educational need. J.A. 42.[4]

Among eligible students within a school, Title I teachers and officials select actual participants strictly on the basis of educational need. While the Title I professionals may take into consideration information provided by the child's regular classroom teacher or principal (J.A. 50), the record clearly demonstrates that the ultimate decision is made by the Title I professional alone. J.A. 50-51. In actual practice, the selections are made almost entirely on the basis of standardized tests administered by Title I personnel. (*Ibid.*; see, *e.g.*, DX U, Tabs A-8, at 4, A-12, at 4, A-13, at 3-4, A-14, at 3-4, A-15, at 4 (affidavits of Title I teachers)).[5]

b. Appellees assert (Br. 11) that the Title I teachers "appear to give far less attention to their instructions than to the advice and recommendations of church school personnel." Nothing in the record supports this extraordinary claim. As found by the *PEARL* court (J.S. App. 91a) and adopted by refer-

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[4] Of course, private schools have the ability to exclude Title I teachers from their premises, or to deny Title I officials information necessary to determine pupil eligibility. Only in this sense might it be said that the private school has any control over whether its students will receive Title I services.

[5] The only support appellees cite for their contrary assertion is their own selective set of quotations from evaluation reports on the program, not credited by the courts below. J.A. 237-250. Even so, the quoted statements suggest only that recommendations of regular classroom teachers and principals were among the criteria considered by Title I teachers in making their selections of Title I participants. J.A. 239, 242, 244.

ence by the district court below (J.S. App. 56a), "[t]he abundant evidence presented in this action demonstrates uniform compliance with the extensive Title I regulations." Further, "[p]eriodic evaluations and direct program supervision assure that Title I staff members comply with the Board's guidelines and restrictions" (*id.* at 74a). There are no known instances of deviation from those instructions (J.A. 52, 53). The court of appeals itself acknowledged (J.S. App. 4a) that the Board's efforts in this regard have been "sincere and largely successful." The pages in the Joint Appendix (J.A. 237-250) cited by appellees (Br. 11) contain nothing that would cast any doubt on this conclusion.

c. Appellees greatly exaggerate (Br. 37) the degree of contact between Title I teachers and the faculty of the private school, and the degree to which the Title I teacher participates in the life of the private school. Without any citations to the record, appellees state (*ibid.*) that the Title I teacher "becomes a member of the church school faculty" and that the Title I teacher and the regular classroom teacher "are closer together, at least in the educational process, than any two members of the church school faculty." Appellees also assert (*id.* at 14-15 n.11) that Title I and regular classroom teachers engage in "team teaching." The courts below, including the court of appeals, concluded otherwise.

The *PEARL* court characterized the on-premises Title I program as a "school within a school" (J.S. App. 98a (citation omitted)), noting that "Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools." J.S. App. 98a-99a. Neither "team teaching" nor any other "cooperative instructional ac-

tivities" are permitted. *Id.* at 74a. The court of appeals stated (J.S. App. 14a (citation omitted)) that " 'Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school.' " [6]

Although Title I teachers may "discuss a student's needs and progress with their counterparts on the parochial school faculty" (*PEARL*, J.S. App. 74a), those contacts have a strictly limited focus. Appellees' vision of "constant communication" (Br. 37) and a "close working relationship" (*id.* at 38), in which the Title I teacher instructs the regular classroom teacher about how to "understand the problems and the solutions to the problems of the Title I students" (*id.* at 37) is entirely imaginary.

d. Appellees implicitly admit that the factual record does not support their position. That is why they ask this Court to permit them a second opportunity, on remand, to produce additional evidence (Br. 49 n.20). We oppose this suggestion. Appellees had a full opportunity to adduce whatever evidence they deemed relevant; that the factual findings of the district court are unfavorable is no reason to provide them a second bite at the apple.[7]

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[6] The court identified this statement as a summary of the defendants' factual position, but noted elsewhere that it was relying on the defendants' statement of facts, which was essentially undisputed. J.S. App. 10a.

[7] In this connection, we would note that the amicus curiae brief filed by Americans United for Separation of Church and State, et al., attempts to put before this Court certain evidence in the Title I case pending in Missouri, *Wamble* v. *Bell*, Civ. No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977). In addition to being entirely irrelevant to this case, the evidence presented by amici reflects a one-sided and misleading view of the Missouri case. The

3. Appellees attempt to show (Br. 26-29) that the New York Title I program has the "primary effect" of "inhibiting religion," most importantly because of the "inevitable tendency" of private religious schools that wish their students to be able to participate in Title I "to make themselves, or make themselves appear to be * * * less sectarian—i.e., less religious" (*id.* at 29). But there is absolutely no evidence in the record to support this speculation; indeed, appellees themselves assert elsewhere (*id.* at 38-40) that the schools involved in this case remain robustly sectarian even after almost 20 years of the program. And it is undisputed that neither the federal government nor the Board of Education makes any inquiry regarding the religiosity of a private school at which Title I services are provided.[8] All that is required of the private school is that it permit access by Title I personnel and provide a religiously neutral classroom. Beyond those simple requirements, the school may be as "religious" as it sees fit, and the existence of the Title I program has no effect, one way or another, on its religious practices.[9]

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district court in *Wamble* has not made any of the determinations of credibility or probative value that will be necessary before undigested evidence of this sort could properly be evaluated.

[8] As it happens, the *PEARL* court concluded that the nonpublic schools involved in the New York program are not "pervasively sectarian" as that term has been used in this Court's cases. J.S. App. 96a.

[9] We question appellees' standing to complain of inhibitions on the religious rights of their opponents in this litigation. See *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961). If the religious schools of New York consider it consistent with their faith and practice to provide religiously neutral classrooms for Title I instruction, who are appellees to tell them otherwise?

4. Appellees also argue, somewhat inconsistently, that the "primary effect" of the New York program is to "advance religion" (Br. 29-42). This argument was rejected by the district court, and not addressed by the court of appeals. Appellees' reasons are not persuasive.

The only "particular conduct" of Title I personnel that appellees suggest violates the "primary effect" test is the supposed "close working relationship" (but see pages 7-8, *supra*) between them and the regular classroom teachers and principals, which "inevitably aids the church school personnel, particularly the regular classroom teachers, in *all* of their courses, and, specifically, in reintegrating the Title I students into all of those courses" (Br. 42 (emphasis in original)). The suggestion seems to be that it is impermissible for public school teachers to behave in such a way as to enable private religious school teachers to teach more effectively. But this is an astonishing suggestion. The Establishment Clause has never been thought to prohibit government from practices that have the indirect effect of improving the quality of teaching in private religious schools. If it did, government would be barred from practices such as setting standards for and accrediting religious schools (cf. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925)), or even allowing present or future religious school teachers to attend public universities. Educational training courses provided on an even-handed basis to all teachers, private and public, are unquestionably constitutional. And it is perverse to suggest that the Title I program is unconstitutional because one of its indirect effects may be to improve the quality of the education ~~received in~~ that private schools provide to their own students.

In fact, the record in no way supports the notion that the Title I program is either intended to provide supplemental training for private school *teachers* or has that as its effect. The most that can be supposed is that private school youngsters who have been helped by the Title I remedial program will be more successful in all their classes, thus improving the quality of the entire program—an "effect" of Title I that is, happily, entirely constitutional.

Appellees also suggest (Br. 36) that the "prestige" of the Title I teacher is "transferred to the school in which he teaches," and that this has a "coerceive effect" on the students. In a similar vein, amicus curiae the Anti-Defamation League suggests (Br. 16) that "the availability of on-site remedial education services operates as a powerful enrollment inducement for parochial schools." In fact, however, Title I services are provided on a comparable basis in public and nonpublic schools alike. The effect, therefore, is neutral; private schools neither gain nor lose, relative to public schools, with respect to prestige or enrollment as a result of the program.

Finally, appellees attempt to draw an analogy bebetween Title I teachers and the various forms of instructional materials that this Court has held may not be provided to private schools (Br. 35). Such materials can be diverted to nonsecular use by the private school teachers; to provide it, therefore, might advance the religious teaching of the schools.

The analogy cannot be stretched to Title I teachers for the simple reason that teachers cannot be "used" or "diverted" by private schools. Unlike a map or an item of audiovisual equipment, a teacher is in control of himself. The record establishes that the Title I teachers are not under the control or supervision of private schools officials, that they have not been pres-

sured to conform their teaching to the religious dictates of the private schools, and that they have not done so (J.A. 52, 53-54, 81).

Appellees use this analogy to support their claim (Br. 41) that it "is simply not true" that the benefits of the Title I program flow directly to the students. We think appellees miss the point. As this Court recognized in *Wheeler* v. *Barrera*, 417 U.S. at 406 (emphasis in original), the Title I program is structured to ensure that the benefits are provided directly "to educationally deprived *children* rather than to specific schools." Our opening brief (at 23, 30-32) elaborates the point.[10] Appellees' theory that because the assignment, movement, and scheduling of the Title I teachers are not controlled by the students, the benefit does not flow directly to them (Br. 41) is plainly a non sequitur.[11]

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[10] It is in this connection that the distinction between supplemental and substitutionary courses, discussed in our opening brief (at 7, 9, 32), is significant. See Appellees' Br. 22. Courses that are strictly supplemental, *i.e.*, not otherwise offered, benefit the students; courses that supplant or substitute for the school's own offerings, in contrast, benefit the school by relieving it of an obligation or expense. The assertion of amici curiae the American Civil Liberties Union, et al. (Br. 18), that such a distinction is "both educationally indefensible and wholly impractical" will come as a surprise to federal, state, and local educational officials who regularly apply the distinction (under the "supplement, not supplant" provision of Title I, now 20 U.S.C. 3807(b)) in both public and nonpublic schools. There is a well-established body of law, developed independently of the Establishment Clause, that governs this area. See *Secretary of Education* v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984). This Court therefore need not now decide the constitutionality of programs that go beyond supplemental, nonsubstitutionary offerings.

[11] Appellees purport (Br. 41) to distinguish *Board of Education* v. *Allen*, 392 U.S. 236 (1968) on the basis that the textbooks there were requested and then held by the students. However, in *Allen* the request could in fact be made on behalf of groups or classes of students by a "private school official" (*id.* at 255 (Douglas, J., dis-

5. The gist of appellees' argument that the Title I program entails excessive entanglement between religious and governmental authorities is not, as the court of appeals would have it, that there is or must be intrusive "surveillance" of Title I teachers by public school authorities (cf. J.S. App. 36a). Indeed, appellees state (Br. 47-48) that there has been relatively little surveillance of that sort.[12] Rather, appellees contend that the mere "interaction" between Title I teachers and their private school counterparts is the source of the entanglement. See *id.* at 46, 48.

As noted above, appellees' vision of the degree of interaction between Title I and private school teachers is greatly exaggerated. It is a matter of so little

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senting)). Indeed, the Title I program would seem less problematic than that in *Allen*, since the textbooks in *Allen* were selected by the private schools for use in their own curriculum, while the Title I instruction here is strictly developed and controlled by public school authorities.

[12] In fact, appellees complain that there is not enough surveillance (Br. 48). They seem to assume that the separation of church and state requires continuous monitoring of all contacts between public school teachers and private school students and teachers that occur on the premises of private schools, lest those contacts be turned to religious ends. But the argument proves too much, for it is based on assumptions that cannot be limited to Title I instruction given on religious school premises. If public school teachers are minded to smuggle religion into their teaching, why should they do so only on the premises of religious schools?

Underlying appellees' assertions is an unexamined skepticism about the professionalism and integrity of our public school teachers. The principle of separation of church and state has never been thought to require us to have a religious test for our public school teachers in order to screen out those who are personally devout. Our tradition is to assume that, within a decent and professional context of supervision, our teachers can be trusted to keep their personal religious convictions out of the classroom. Why should this trust wholly disappear when we send these same teachers into private schools to teach remedial math and English?

importance in the context of the program as a whole that it was not even discussed in the lengthy opinions of the courts below. But even assuming a degree of interaction exceeding that revealed by the record, it misapprehends this Court's precedents to find in such contacts an unconstitutional entanglement between Church and State. This is for two reasons.

First, this Court's principal concerns in this area relate to students, not to teachers; to children, not to adults. The possibilities of subtle religious indoctrination that have guided this Court's decisions regarding elementary and secondary schools have not been applied to colleges and universities (see *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971)) or to adults in other contexts (*Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 8-9). Whatever surveillance might be thought necessary to protect schoolchildren from indoctrination is simply not needed to protect Title I and other teachers during their private consultations.

Second, and more fundamentally, this Court's concern about entanglement does not arise from mere contact or interaction between religious and governmental officials. See *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 3-4; *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). The concern arises only when the contact brings government to bear on matters of religion (or vice versa). See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971) (the purpose of the entanglement inquiry is "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other"). Thus, in *Lemon* and *Meek*, this Court was concerned lest the government become embroiled in religious judgments because of the need for surveillance of the religious school

teachers involved. Here, the record clearly shows that the consultations between Title I teachers and their private school counterparts are confined to Title I matters and do not touch in any way on religion. (J.A. 51-52). This form of professional interaction is far from the "comprehensive, discriminating and continuing state surveillance" of personal beliefs and religious practices at issue in *Lemon* (403 U.S. at 619).[13]

6. Appellees' various arguments form a consistent theme. Without denying the legitimate secular, educational purpose of the Title I program, or the serious educational reasons why New York has come to rely on an on-premises approach, appellees put forward a miscellany of hypothetical and speculative objections, not supported by the record, designed to frustrate or block effective achievement of the congressional purposes. We believe the program should be judged on its merits. If this Court were to decide that, on account of the Establishment Clause, children who choose to attend religiously oriented private schools must forfeit their right to participate in remedial educational programs intended by Congress to be available to all, then the program must fail. But it should not be invalidated on the basis of conjectures with no relationship to the actual workings of the program.

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[13] If any interaction, even of a wholly nonreligious nature, between agents of the government and agents of a religious organization constituted an "entanglement" between church and state, many relationships between religious and governmental authorities, now considered unobjectionable, would become suspect. These would include medical consultation in the context of religious hospitals, state accreditation of private religious schools, governmental cooperation with religious institutions serving the homeless, and even police and fire protection for churches and synagogues. This Court has made clear, however, that such contacts between governmental and religious institutions are constitutionally permissible. See, *e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947).

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOS. 84-237, 84-238 and 84-239

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On Appeal from the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR APPELLANT CHANCELLOR

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On Appeal from the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR APPELLANT CHANCELLOR

A. Appellee's thesis that remedial services funded pursuant to Title I need not be provided to educationally deprived children who are students at religious affiliated schools is without legal basis.

In apparent recognition that the provision of Title I remedial services to educationally deprived students at New York City's religious affiliated schools, off the site of such schools, is not an efficient means for accomplishing the purpose of such federal aid, appellees urge that the benefits of Title I may be limited to students at New York City's public schools. App. Br., pp. 15, 17, 23-25. Indeed, appellees claim that this Court need not "strike down [Title I]" because the funds now used to provide services to students of religious affiliated schools may be used for other students who attend public schools. *Id.*, p. 23. According to appellees, the Constitution requires that educationally deprived students be denied the remedial and counseling assistance provided by Title I merely because their parents have chosen to enroll them in schools affiliated with churches or synagogues.

Whether or not Congress could properly refuse to extend the remedial education benefits of Title I to students at religious affiliated schools (*see Pierce* v. *Society of Sisters,* 268 U.S. 510 [1925]), appellees' thesis is inconsistent with the concept of accommodation of religions restated in recent decisions of this Court. *See, Lynch* v. *Donnelly,* —— U.S. ——, 104 S. Ct. 1355, 1359 (1984), *reh. den.,* —— U.S. ——, 104 S. Ct. 2376 (1984). Such result is not mandated by the Establishment Clause. Furthermore, contrary to appellees' claim, Title I and regulations promulgated thereunder mandate that eligible students in nonpublic schools receive Title I assistance and that per-capita expenditures for public and nonpublic students be equivalent. 20 U.S.C. §3806(a); 34 C.F.R. §§200.70 and 200.71

(1984); *see also, Wheeler* v. *Barrera*, 417 U.S. 402 (1974), *mod.*, 422 U.S. 1004 (1975). Accordingly, the Board of Education is not empowered to discriminate against nonpublic school students and transfer funds intended for the nonpublic school program to the Board's public school Title I program. Rather, appellees' argument merely underscores the mischief traceable to their absolute First Amendment arguments.

B. Appellees have failed to show that the Board of Education's Title I program has a primary effect of either advancing or inhibiting religion.

Appellees contend not merely that the presence of Board of Education personnel in religious affiliated schools has a primary effect of advancing religion, but also of inhibiting it. App. Br., pp. 26-29. The claimed inhibition of religion, apparent to no other party to the litigation, is totally unsupported. The removal of religious fixtures from Title I classrooms, far from being a violation of the First Amendment, is minimally intrusive and a proper accommodation of the respective interests of Church and State. App. Br., pp. 26-27. Similarly, there is no record evidence to support appellees' speculation that the religious affiliated schools in New York City have been desecularized for the purpose of obtaining federal aid. App. Br., p. 29. Finally, appellees' argument that federally-funded Title I programs should be taught by parochial school teachers is, to say the least, disingenuous. App. Br., pp. 27-28. While the main thrust of their brief urges adoption of a *per se* rule prohibiting the mere presence of public school teachers on the premises of religious affiliated schools, their suggested alternative is one having far more serious implications under the Establishment Clause.

As for appellees' argument that the Board's program has a primary effect of advancing religion, it is submitted that their brief reveals that any effect on religion is, at most, "remote". *See, Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364. While remediation has been successful in helping students at religious affiliated schools to overcome their educational problems, and may even, as appellees speculate, have had an incidental effect of enabling their classmates to "move ahead in their studies instead of being held back by the Title I student" (App. Br., p. 37), this indicates only that the Boards' Title I program has been successful in fulfilling the Congressional purpose of assisting all educationally deprived children, whether they be students at public or private schools. *See, Wheeler* v. *Barrera, supra,* 417 U.S. at 405-406. The fact that the administration and faculty of the nonpublic schools assist in identifying[1] students eligible for Title I assistance, and consult with the Title I teachers concerning the students' needs and progress, does not rise to the level of an Establishment Clause violation but rather serves to effectuate the purpose of Title I. App. Br., pp. 20, 37, 41, 42.

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[1] In light of the cultural and economic background of many educationally deprived children, and the statutory and regulatory criteria for eligibility (*see* Br. of Sol. Gen., p. 3), appellee's apparent suggestion that students should request Title I services is less than candid. App. Br., p. 41.

C. In seeking to show excessive entanglement, appellees have misconstrued the nature of the relationship between the Board's Title I teachers and the schools at which they teach.

The Court of Appeals, in holding that the Board of Education's program violates the Establishment Clause, relied on its findings of excessive potential entanglement; accordingly, that issue has been briefed by the various appellants and we will not reiterate those arguments here. However, in discussing entanglement, and throughout their brief, appellees make reference to the "close relationship" between the Title I teachers and the teachers and adminstrators of the religious affiliated schools. App. Br., pp. 12, 19, 37, 46. At one point, appellees appear to urge or at least imply that the Title I teachers violate the Board's instructions and become involved in team teaching. App. Br., pp. 11-12. The evidentiary material upon which appellees rely, contained in the Joint Appendix in excerpted form at pages 237 through 250, shows only that the Title I teachers and counselors maintain the kind of contact with the school administration and faculty necessary for effective remediation. There is no indication of any team teaching or any other improper cooperative activities between Title I teachers and nonpublic school teachers.

We would finally note in connection with appellees' request for a remand (App. Br., p. 49, n. 20), that the Court of Appeals in its opinion recognized that there is no dispute as to the basic facts of this litigation. Appendix to Jurisdictional Statement, p. 10a. Under the circumstances, it is respectfully submitted that there is no need for a remand.

CONCLUSION

The judgment of the Court of Appeals should be reversed, with costs. The judgment of the District Court granting summary judgment to defendants upon a declaration that Title I, as administered in nonpublic schools of New York City, does not offend the Establishment Clause of the First Amendment, should be reinstated.

Dated: New York, New York
November 27, 1984

Respectfully submitted,

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On Appeal From The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF APPELLEES

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**On Appeal From The United States
Court Of Appeals For The Second Circuit**

SUPPLEMENTAL BRIEF OF APPELLEES

Appellees submit this supplemental brief on the merits under Rule 35 of the Rules of this Court to bring before the Court the decision and judgment of the United States District Court for the Western District of Missouri in *Wamble* v. *Bell*, No. 77-0254-CV-W-8, slip op. (W.D. Mo. Nov. 28, 1984). The decision in the cited case was filed on November 28, 1984, after Appellees were required to file, and had filed, their main brief

on the merits. A copy of the full decision in the cited case is annexed to this Supplemental Brief as an Appendix.

The *Wamble* case is pertinent because at issue was the Title I "by-pass" program instituted and operated in Missouri by the Secretary of the Department of Education under Title I after the Missouri Supreme Court had held that it violated the State Constitution to extend Title I services to "nonpublic" schools. The Missouri Title I "by-pass" program is essentially the same in all respects as the New York City Title I program in question in the appeals before this Court.

In *Wamble*, which was decided after 23 days of trial, the District Judge, Joseph E. Stevens, Jr., held that the Missouri Title I "by-pass" program violated the Establishment Clause of the First Amendment, and permanently enjoined the program, but stayed his injunction pending this Court's determination of the three appeals in the instant case.

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IN THE
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WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0254-CV-W-8

G. HUGH WAMBLE, *Plaintiff*,

and

VERLINE COBBINS, *et al.*, *Intervenor-Plaintiffs*,

vs.

TERREL H. BELL, Secretary of the
United States Department of Education, *et al.*, *Defendants*,

and

DEMPSTER AND PAULINE FERGUSON, *et al.*,
Intervenor-Defendants.

FILED
NOV 28, 1984

MEMORANDUM OPINION AND ORDER

Prologue

This multi-faceted constitutional challenge to a significant federal educational program was first filed in this court in April of 1977. It has made its tortuous way through three divisions and before as many judges of this court, finally coming to rest in this division in late 1981. Before assignment of the case to this division, discovery and trial preparation proceeded apace until a stay was entered by Judge Collinson on March 30, 1979, pending the outcome of a similar case, *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980) (hereinafter referred to as *Pearl*).

Pearl was decided on April 18, 1980, the final stay order was lifted, and extensive discovery was conducted from that time until transfer here. The court placed counsel on what was characterized as a "fast track" in late 1981 to complete discovery and trial preparation, and after four and a half years of pendency the case finally came to trial on August 2, 1982. During the next five months the court held twenty-three separate days of trial.

After trial and extensive post-trial briefing there began a series of suggestions by one party or the other that the court delay its decision in the case until the opinions in several cases pending elsewhere were handed down. The last of such cases was *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, ___ U.S. ___ (1984),[1] and it is now suggested that action by this court should be further delayed pending the Supreme Court's decision in *Felton*, certiorari having been granted on October 1, 1984. While that decision may very well affect the result reached here, the court is convinced that the time has come to rule and let this decision assume its proper role in this on-going drama.

Introduction

Before the court is an Establishment Clause challenge to federal legislation, Title I of the Elementary and Education Act of 1965, 20 U.S.C. § 2701 *et seq.* (hereinafter Title I), designed to provide remedial education services for public and nonpublic school children who reside in low-income areas and

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[1] Judge Friendly of the Second Circuit in *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, ___ U.S. ___ (1984), provided a chronological discussion of the Supreme Court's relevant decisions with regard to government aid to religious schools. In fact, *Felton* is strikingly similar in its facts and issues to the case at bar and this court finds Judge Friendly's exposition of the development of the law to be thorough and persuasive. We, therefore, adopt his analysis, limiting this discussion to the law as it relates to the facts before us.

whose scholastic or testing records demonstate a need for such services. This action was originally brought by Dr. Hugh Wamble, an individual taxpayer. Thirty-two other taxpayers and seven parents of public school students entitled to receive Title I assistance later were permitted to intervene as plaintiffs (hereinafter with Dr. Wamble jointly referred to as plaintiffs unless otherwise specified) against the defendants named by Dr. Wamble, to wit: the Secretary of the United States Department of Education (hereinafter USDOE or the Secretary),[2] Blue Hills Home Corporation (hereinafter BHHC), the entity contracting with USDOE to provide Title I services for Missouri's nonpublic school students, and BHHC's Executive Director John P. Cole. Thirteen parents of students in religiously affiliated schools were permitted to intervene as defendants (hereinafter with the originally named defendants jointly referred to as defendants unless otherwise specified). Jurisdiction is appropriately invoked pursuant to 28 U.S.C. §§ 1331, 1391, 2201, and 2202.

Plaintiffs challenge the Secretary's decision to invoke the "bypass provision" of the Act in question, 20 U.S.C. § 3806(b), which authorizes payment of funds to an independent contractor who provides services in parochial schools in jurisdictions where the public education authority either will not or cannot administer the funds in parochial schools. Plaintiffs condemn the contractor, BHHC, as a religiously affiliated and controlled organization, seek to enjoin permanently the operation of Title I in Missouri's nonpublic schools and request a declaratory judgment that the bypass statute on its face and as administered violates the First Amendment prohibition against establishment of religion.

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[2] Prior to the May, 1980, creation of the Department of Education, the Commissioner of the United States Office of Education administered Title I. Because this case was filed prior to the existence of the Department of Education, the court could have referred to the Title I administrator at the federal level as either the Secretary or the Commissioner.

Specifically, this case presents two fundamental questions: (1) Does this federal statute which authorizes the payment of funds to an independent contractor with directions to that contractor to provide remedial services for educationally deprived children residing in low-income areas and attending nonpublic schools, the majority of which are church-affiliated, on its face violate the Establishment Clause of the First Amendment to the United States Constitution? (2) Assuming *arguendo*, that Title I is not unconstitutional on its face, does Title I as administered on the premises of Missouri's parochial schools during the school day in rooms largely devoid of religious symbols by teachers paid and supervised by this independent contractor, nevertheless violate the religious neutrality and entanglement principles enunciated in *Wolman* v. *Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977) and *Meek* v. *Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975)? After waiting for and studying opinions from other jurisdictions involving similar questions and upon careful review of the record made in this twenty-three day trial, this court answers the first question in the negative and the second question in the affirmative.

Background

Congress enacted Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (codified as amended 20 U.S.C. § 2701 *et seq.*) for the express purpose of funding locally administered compensatory learning programs—remedial education to benefit *all* educationally deprived children residing in low-income areas. *See* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] United States Code Cong. and Ad. News, pp. 1446, 1450. The Secretary administers Title I at the federal level, state educational agencies (SEA) normally implement it, and local educational agencies (LEA) customarily operate and manage the program on a day-to-day basis. 20 U.S.C. § 380 (West Supp. 1982).

All students who are educationally deprived, defined as below age-level in academic performance, and who reside in a

low-income area are eligible to participate in a Title I program, 20 U.S.C. §§ 2722, 3804, 3805, 3806. To receive federal funds to finance Title I programs for children in parochial schools, an SEA must file an assurance with the Secretary that a nonsectarian agency will control the funds and that the SEA will assure proper disbursement of funds through fiscal control. 20 U.S.C. § 3876(a). The related LEAs in turn file with the SEA applications describing the project and assuring the SEA that it will provide for equitable participation of all eligible children in the area regardless of whether they attend public or nonpublic schools. 20 U.S.C. § 3805(a) and (b). *See also* 20 U.S.C. §§ 2740; 3806(a), (b); 47 Fed. Reg. 52, 350 (1982) (to be codified at 34 C.F.R. § 200.70). Each LEA is responsible for insuring that the needs of nonpublic and public school children are met on a basis comparable in quality, scope, and opportunity, and that expenditures are equal.[3] 20 U.S.C. §§ 2740(a); 3806; 47 Fed. Reg. 52,350. In addition, Title I mandates that instruction supplement, not supplant, regular classroom instruction, 20 U.S.C. § 3807(b), and that "[n]othing in [Title I or its revised version effective October 1, 1982, Chapter I, 20 U.S.C. § 3801 *et seq.*] shall be construed to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384.

Early Title I benefits for nonpublic school children in Missouri consisted of equipment and materials without instruction while public school children received on-site remedial instruction in reading, math, and verbal arts. In *Barrera* v. *Wheeler*, 475 F.2d 1338, 1353 (8th Cir. 1973), the Eighth Circuit held that the Missouri Commission of Education and the Missouri Board of Education failed to provide comparable services to both public and nonpublic school children.[4] Pending appeal to

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[3] The "equal expenditure" requirement became a part of the statute in the 1978 amendments to Title I found in Pub. L. No. 95-561, 92 Stat. 2153 (codified at 20 U.S.C. § 2740(a)).

[4] The history of litigation over Title I in Missouri is well-documented. During the 1970's, the court in *Barrera* v. *Wheeler*, 531

the Supreme Court, the Honorable William R. Collinson of this district issued an injunction ordering the LEAs to provide comparable services to nonpublic school children—remedial instruction in the nonpublic schools by public teachers during the regular school day. During the 1973-74 and 1974-75 school years, eligible children were released from their regular classes to attend a separate Title I class, known as "pull-out,"—which supplemented rather than supplanted regular instruction.

In 1974, the Supreme Court affirmed the Eighth Circuit, holding that the services provided to the nonpublic school students "were plainly inferior, both qualitatively and quantitatively." *Wheeler* v. *Barrera*, 417 U.S. 402, 415, 94 S. Ct. 2274, 2282, 41 L. Ed. 2d 159 (1974). The court declined, however, to decide whether Title I's mandate for "equitable participation" was a requirement of on-premise instruction or whether such on-premise instruction would be constitutional. Instead, it remanded the case to Judge Collinson to develop guidelines designed to assure LEA compliance in Missouri with Title I.

Later in 1974, Congress amended Title I to remedy inequities allegedly found in Missouri and elsewhere caused by state or local laws which prohibited state agencies from offering equitable participation to eligible nonpublic school children. It authorized the Secretary in such a circumstance to *bypass* state and local authorities and to provide Title I services directly to educationally deprived nonpublic school children through the use of independent contractors unrelated to

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F.2d 402 (8th Cir. 1976) referred to the "apparently endless legal battle" over this statutory program. Questions about Title I have been addressed in *Barrera* v. *Wheeler*, 441 F.2d 795 (8th Cir. 1971); *Barrera* v. *Wheeler*, 475 F.2d 1338 (8th Cir. 1973); *Wheeler* v. *Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974); *Mallory* v. *Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

state or local governmental agencies.[5] Pub. L. No. 93-380, 88 Stat. 484 (originally codified at 20 U.S.C. § 241e-1 (1976)); 20 U.S.C. §§ 2740(b), 3806(b).

In Missouri, the Secretary initially took no steps to implement a bypass program. USDOE viewed the services required for nonpublic school students under Judge Collinson's injunction as comparable to those provided for public school students. On remand in 1975, however, Judge Collinson dissolved the injunction and accepted the Missouri SEA's plan to approve LEA applications, a plan providing for equitable expenditures but otherwise failing to ensure a program for nonpublic school children comparable in size, scope, or opportunity to the program offered to public school children. *Barrera* v. *Wheeler*, 531 F.2d 402, 406-07 (8th Cir. 1976). For nonpublic school children, LEA applications provided for instruction given on the premises of *public* schools before or after regular school hours or on Saturday. Public school children continued to receive "pull-out" instruction on-premises during the school day. For a variety of reasons not unrelated to parent, pupil and school administration reaction to off-premise instruction (*see* p. 10 infra), the number of private school children accepting the offered service dropped to one-half the number previously served under the Collinson injunction.

In 1976, representatives of parochial schools in Missouri asked the Secretary to consider a bypass of the state and local educational agencies. This request followed a decision by Missouri Commission of Education that administration of an on-premises program by the state with public funds provided by the USDOE violated the Missouri Constitution.[6] A USDOE

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[5] The costs of the bypass services, including any administrative costs, are deducted from the funds made available to the LEAs and SEAs in the affected area. 20 U.S.C. § 3806(b)(3)(A); 34 C.F.R. 20195(c).

[6] The Director of Governmental Programs for the Archdiocese of St. Louis suggested a form letter for use by parocial school adminis-

investigating team then reviewed the statistics demonstrating the number of pupils participating, studied the LEA project applications and met with state and local staff as well as parents. It investigated accusations that the decline in participation in the off-premises program was caused by a parochial school boycott. After a thorough investigation, the team concluded that the poor attendance was due to student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for safety, students' conception that the after hours program was punishment, and conflicts with family obligations. Poor attendance was *not* due to a boycott. In addition, the team found that 31.2 percent of the Title I budget for nonpublic schools was spent on teachers' salaries and 40 percent was spent on non-instructional costs such as transportation and facilities rental. In stark contrast, 72.8 percent of funds in the public schools was applied to teachers' salaries.

On July 22, 1976, following this investigation, the Secretary concluded, pursuant to 20 U.S.C. § 3806(b)(2) of the bypass

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trators in protesting the State Board of Education's refusal to provide remedial teachers within the parochial schools; the SEA received a "substantial amount of mail" from parochial school principals and parents of parochial school students, the "great majority of which related to the provision of Title I services in private schools during the school day," Tr. II at 17-18; and certain parochial school administrators of Catholic and Lutheran schools in Missouri wrote a letter to USDOE seeking the invocation of the bypass because of their belief that the programs offered to nonpublic school students were not comparable to those being offered to public school students. The letter was jointly signed by various superintendents.

Dr. Wamble, on the letterhead of the Missouri Baptist Convention and in his capacity as president of the convention also wrote a letter. In contrast to the position of the parochial school administrators, he encouraged Senator Eagleton to vote "no" on the then-*proposed* amendment and, in defining his support, he noted the size of the convention (1,840 churches with reported membership of 555,000) and the convention's long-standing opposition to tax support of education in church-related schools.

provision, that the four LEAs investigated "substantially failed to provide for the participation on an equitable basis . . . and the establishment of a 'bypass arrangement' to provide services . . . [was] warranted." *Plaintiffs' Exhibit No. 304.* This decision followed a September, 1975 Jackson County, Missouri circuit court ruling which affirmed the prior position of the State Board of Education that Missouri's constitution prohibits state involvement in the use of Title I funds for instruction given on the premises of parochial schools, a decision repeated by the Missouri Supreme Court on December 30, 1976, in *Mallory* v. *Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

After soliciting bids on three proposed bypass projects in Missouri, USDOE, on February 14, 1977, awarded contracts for three areas to BHHC. A fourth contract was awarded to BHHC on October 1, 1977 and, by the end of the 1979-80 school year, USDOE had consolidated its award for statewide nonpublic school Title I services under one contract with BHHC, bypassing fifty-three Missouri LEAs. This contract expired July 31, 1982. Under properly established contract procurement procedures, it was again awarded to BHHC for the 1982-83 school year.

Plaintiffs challenge the program in Missouri, alleging that BHHC is a religiously affiliated and controlled organization which, by receiving funds directly from the federal government for use in religiously affiliated schools, blatantly violates the prohibition against establishment of religion. This court agrees that at the time the initial consolidated award was made for the bypass program in Missouri, BHHC appeared to be a religiously affiliated organization even though its articles of incorporation, by-laws, and express purposes were entirely neutral. BHHC was incorporated on July 19, 1974, as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including the pastor at that time, Norman Rotert. It originally operated out of office space in buildings owned by St. Therese Church, and many of the teachers first hired were

persons known to BHHC through their common affiliation with the parochial schools.

By the time BHHC was awarded a second state-wide contract, it had changed its apparent character and became ostensibly neutral. In 1979, the organization moved from the buildings owned by St. Therese Church to a commercially owned mall. Further, its new board members were not predominantly Catholic, and it deliberately avoided questioning prospective teachers about their religious affiliation. Consequently, the court finds that teachers were not purposely placed in a school which matched their chosen religion. This finding is corroborated by the evidence which shows only an incidental overlap in this representation. Indeed, seventy-nine percent of the BHHC teachers were assigned to schools with religious affiliations different from their own. Finally, while plaintiffs argue that the executive director of BHHC, John Cole, a former Catholic priest, was offered the job because he attended seminary with Father Rotert, an incorporator, the evidence reflects and this court finds that his religious affiliation is not the primary reason he was hired. Other factors in his hiring were his life-long friendship with Rotert, his experience as a former USDOE employee, and the fact that he possessed "capabilities for the job." Tr. III at 27-28.

The bypass, including administrative costs, is funded by withholdings from Missouri's SEA allocations. USDOE requires BHHC to submit a Program Design on June 1 of each year which, when approved by USDOE, is the contractural basis for BHHC's obligation to provide Title I services the following year. No funds flow to the nonpublic school authorities.

In this case, the Program Design states that BHHC must provide services comparable to services provided by an LEA at the public school and it establishes procedures to compare costs, selection criteria, and the scope of the two programs. The educational services are provided *on site* at the parochial schools during regular hours. The services include sup-

plemental instruction in remedial reading, mathematics, and language arts for educationally deprived children residing in low-income areas and enrolled in nonpublic schools, the majority of which are sectarian. The contract requires staff orientation and in-service training, supervision and monitoring of staff, coordination of services and consultation with the classroom teacher, selection of materials to fit the needs of students, assurance that materials are used only for Title I purposes, communication with parents, and remedial instruction based upon the individual needs.

BHHC takes steps to ensure its own religious neutrality and tries, sometimes without success, to ensure that the teachers and classrooms are neutral. BHHC supervisors inspect instructional facilities to make sure that the sites are adequate and free of religious artifacts. All teachers are monitored and trained solely by BHHC supervisors. Orientation sessions include oral instructions designed to ensure religious neutrality,[7] and the 1982-83, "Chapter I Handbook" affirms that "BHHC must manage the instructional program separate from the nonpublic schools to insure . . . 'noninvolvement' and 'nonentanglement' . . ." *Defendants' Exhibit 53* at 21.

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[7] Oral instructions include 1) that the teachers are accountable only to BHHC supervisors and are not subject to the supervision or control of nonpublic school personnel; 2) that they are assigned to the nonpublic school solely to provide services to those students meeting the eligibility criteria and that they alone are responsible for the selection of those students; 3) that they are to consult with nonpublic school teachers and administrators about the educational needs of the students; 4) that they must assure that materials and equipment procured for Title I contain no religious content and are not used in the nonpublic school curriculum; 5) that they are not to engage in teaching or other cooperative instructional advitities with nonpublic school teachers; 6) they are not to become involved with the religious activities of the nonpublic schools in any way except to attend faculty or parent-teacher meetings to explain Title I; 7) that they are not to introduce or allow any religious discussion with any nonpublic school personnel; and 9) that they are to maintain the Title I classroom free of religious symbols.

Nonpublic school personnel exercise no control over the program, the teachers, or the Title I curricula. The Title I teachers indicate that they, like public school teachers, refrain from religious discussion and instruct students who bring up related topics to discuss them with appropriate personnel. Title I materials are used only for Title I purposes. However, nonpublic school *students* are ultimately under the supervision of nonpublic school administrators, and federal monitoring often *excludes* inquiries about religious neutrality.

Administrative involvement of the federal government or BHHC with the private school personnel can be divided into three general categories: (1) contact for the purposes of planning or scheduling; (2) consultation regarding the educational progress of Title I students; and (3) contact necessary to monitor the administration of the Title I program. The contacts necessary to plan and schedule the Title I program on-premises include identification of the Title I facility within each school, identification of students eligible to receive Title I, scheduling of private school classes with the Title I classes, verification that Title I supplements and does not supplant the private schools, planning of curricula, and attendance by Title I personnel at faculty and parent-teacher meetings to explain the program. In addition, Title I personnel and regular nonpublic school teachers meet to discuss the children's educational needs and progress, and BHHC personnel contact the private school administrators to secure the removal of any visible religious symbols or, occassionally, to discuss discipline problems.

Beginning in 1980, USDOE required BHHC to obtain from nonpublic school officials an assurance of suitable facilities and, in 1981, *written* assurances that the settings were religiously neutral. However, USDOE did not define for BHHC the term "religiously neutral." BHHC, in turn, did not define the term for the school principals.

The classrooms, while generally reserved for the exclusive *use* of the Title I teachers, are otherwise controlled by the

school. Some are rooms located within larger partitioned rooms and some are used by the school for purposes other than Title I activities when Title I classes are not being held. Many Title I rooms are identified by signs which identify them as Title I rooms, but the evidence does not indicate that these signs include notice that Title I is operated and controlled by USDOE and BHHC.

While many BHHC teachers have never seen a religious symbol inside a Title I classroom, religious symbols were found on some fifteen occasions mentioned in the evidence in the trial of this case. Most of the objects were promptly removed or covered, if nonremovable, upon their discovery. In one instance, however, removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Further, the evidence indicates that other incidents *may* have occurred—a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the "school level." Finally, while the bypass teachers and supervisors are aware of religious symbols elsewhere in the buildings, none believe that their presence influences them or their instruction.

The Catholic elementary schools are subject to the jurisdiction, control, and authority of the Diocese, Archdiocese, and Parish in which they are located. The Lutheran elementary schools are subject to the control of their sponsoring congregations. These religious affiliated schools have two goals—one is to "teach the youngsters about God and faith in God," and the other is to "develop all of the academic programs, the secular subjects, as professionally as possible." Tr. XVIII at 42.

Catholic principals generally prefer to hire Catholic teachers. However, several employ persons of other faiths so long as the teacher agrees to contribute to both the religious and educational objectives of the school. Tr. XVIII at 157. Lutheran school administrators, with few exceptions, hire members of the Lutheran Church-Missouri Synod. Lutheran teachers

are "expected to present their lessons from a Christian viewpoint." *See, e.g., Eckhoff Deposition, March 15, 1982* at 106. Catholic school teachers are expected to avoid advocating positions contrary to the Church's teachings. One Archdiocesan handbook contains a specific prohibition against the use of Planned Parenthood materials and speakers.

Preference policies for admission, while they exist, have not resulted in the actual exclusion of non-affiliated students in either Catholic or Lutheran schools. Most of these schools have significant numbers of students who are non-Catholic or non-Lutheran.

There is no way of knowing whether the absence of Title I would result in a greater decline in enrollment than that already experienced by nonpublic schools, there being no specific evidence that parents select schools for their children where Title I is available. Because eligibility must be determined by the teacher, it appears that few parents would know at the time of application that their child is Title I eligible.

In most of the schools, thirty to forty-five minutes per day is spent on religious instruction. Religion classes in the Catholic schools, while it may include instruction about other denominations, "is geared toward the Catholic religion," and emphasizes Christian living, moral values and Bible studies. Tr. XVIII at 61. Lutheran schools similarly strive "to bring the child in touch with the Word of God" . . . "so that the Holy Spirit may work a stronger faith" and so that he may become a "Christian leader." *Plaintiff's Exhibit No. 1260. See also Eckhoff Deposition, March 15, 1982* at 18, 42. With few exceptions, students are required to study, but *not* to accept or to obey the doctrines of the sponsoring church. Teachers in secular classes are encouraged to promote Catholic or Christian values through "values discussions."

The schools regularly schedule religious service or activities, like prayer, during the day, and conduct religious holiday activities. Attendance at religious activities is mandatory in some schools, but not in others. The students are visited

regularly by members of the clergy and, in at least one Lutheran church, teachers ask students on Monday whether they attended church on Sunday. In summary, these religious affiliated schools are an "integral part of the religious mission of the sponsoring church."[8]

Legal Discussion

Plaintiffs make three challenges which may be disposed of at the outset of this discussion.

(1) First, plaintiffs argue that Title I is unconstitutional on its face. The Supreme Court has not held that Title I *requires*

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[8] Two quotes illustrate and reinforce this court's finding that the Catholic and Lutheran schools at issue are "an integral part of the religious mission of the sponsoring church" as well as a conduit for secular education. In "Human Rights," a publication of the Commission on Human Rights of Archdiocese of St. Louis in January, 1978, is an article, "Catholic Church and Its Schools," which states, in part:

> Catholic schools provide the Church an effective way of helping families form young people in value of the gospel. Fr. Andrew Greeley of the University of Chicago has demonstrated that the Catholic school is the most effective instruments for forming young people. In its task of explaining the gospel and helping the young experience it, the Catholic school provides students whose members openly profess their faith, and the peer influence of young people who share a belief in God. It offers time for prayer, the sacraments, and a daily religion class. . . . The Church in many ways, including through its schools, proclaims that the presence of God in all segments of a persons' life is the single most important value of all.

(Plaintiffs' Exhibit No. 1297). The Handbook of Trinity Lutheran School of St. Louis similiary explains:

> It is the responsibility of parents to teach the truths of God's Word to their children because the Bible commands parents to "bring up their children in the nurture and admonition of the Lord." God has also commanded the Church to "teach all nations to observe all things commanded by God." The Lutheran School exists mainly for the purpose of assisting both parents and the Church in meeting these responsibilities.

(Plaintiffs' Exhibit No. 943, p. 1).

on-premises instruction. *Wheeler* v. *Barrera*, 417 U.S. 402, 418, 94 S. Ct. 2274, 2284, 41 L. Ed. 2d 159 (1974). Government subsidized off-premises remedial instruction for nonpublic schools has been held constitutional in *Wolman* v. *Walters*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977). The court has reviewed the bypass amendment and finds that, on its face, it presents no further constitutional impediment to administration of the statute than was presented in *Wheeler*. In this court's opinion, Title I is facially valid because it may be administered within the confines of the Constitution. *See City Council of Los Angeles* v. *Taxpayers for Vincent*, ____ U.S. ____, 104 S. Ct. 2118, 2124, 80 L. Ed. 2d 772 (1984).

(2) Plaintiffs also challenge the Secretary's decision to invoke the bypass in Missouri. This court finds that the Secretary, in making his decision, acted rationally and within the scope of his authority. His decision was supported by a history of imbalanced Title I services for Missouri's nonpublic school students, by substantial evidence gathered by the USDOE investigating team and by a consideration of the relevant facts. *See Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981). Further, it was necessitated by Missouri law. *Mallory* v. *Barrera*, 544 S.W. 2d 556 (Mo. 1976) (en banc).

(3) Finally, plaintiffs attack the character of BHHC. While the religious affiliation of government employees, officers, or contractors in most circumstances is irrelevant and in no way offends the Constitution, *see, e.g., McDaniel* v. *Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978), this court noted in this case that the use of a religious affiliated organization staffed exclusively at the inception of the program by people who were in one way or another affiliated with the Catholic Church, to implement a federally funded program in religiously affiliated schools, flew in the face of Congressional intent and violated the Establishment Clause. Congress intended to substitute a religiously *neutral* organization for SEA-LEA agencies whose operations were prohibited by local or state law. Implementation, management, and supervision of the program by a puppet of the Church, however well-intentioned, is

tantamount to direct fiscal government aid to religiously affiliated schools. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 9 L. Ed. 2d 745 (1971). However, plaintiffs' challenge to the original contract award was rendered moot by the expiration of the initial contract,[9] and, because BHHC was aware of its error long before the award of the second contract, it dramatically changed the composition of its staff and Board of Directors, transforming BHHC into what was ostensibly an entirely neutral organization.

Administration Of The On-Premise Program

The First Amendment to the Constitution of the United States provides in its first clause: "Congress shall make no law respecting an establishment of religion or prohibiting that free exercise thereof. . . ." This provision, the Establishment Clause, historically has served two purposes. It worked to prevent the federal government from establishing one church, and it prohibited aid or preferential treatment to a particular denomination. *See* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. and Lee L. Rev. 347, 362-63 (1984). The Establishment Clause accounted for the concerns of a dominant federalism, reserving for the states the authority to deal with religious matters.[10] It "rested on the belief that a union of government and religion tends to destroy government and to degrade reli-

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[9] Thus, this court need not reach the issue of whether plaintiffs have standing to challenge the award to BHHC. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 100 (1982).

[10] The First Amendment, like the entire Bill of rights, initially served to limit only the federal government. In 1940, the Supreme Court incorporated the First Amendment into the Fourteenth Amendment and extended its application to the various states. *Everson* v. *Board of Education*, 330 U.S. 1, 13, 67 S. Ct. 504, 510, 91 L. Ed. 711 (1947); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 2d 1213 (1940).

gion." *Abington School District* v. *Schempp*, 374 U.S. 203, 222, 83 S. Ct. 1560, 10 L. Ed. 2d 844, citing *Engel* v. *Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 1267, 8 L. Ed. 2d 601 (1963). A church unduly involved with government might be subverted to redirect its programs to meet ends chosen by government. The church would be compromised in its efforts to act in accordance with its higher calling. *Id.*

In extending Title I in a nondiscriminatory manner to religiously affiliated schools, courts recognize the parallel goals of Congress, individual states, and particular institutions to educate all students within the confines of the existing economic structure. The "State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 797, 93 S. Ct. 2955, 2978, 37 L. Ed. 2d 948 (1973). The parents of parochial school children, electing by reason of their convictions to send their children to these schools, nevertheless pay taxes for public education and, therefore, have historically sought some measure of public support to enhance the quality of education for their children or at least to make it comparable to that received by public school children. This is the case here where public funds have been appropriated to provide remedial instruction for the educationally deprived.

At least to the extent that such remedial instruction might be provided by public school teachers to parochial school children off the premises of the parochial schools, the Supreme Court has succumbed to these intertwined economic and educational goals, stating, "Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman* v. *Walter*, 433 U.S. at 247, n.14. Accordingly, the Supreme Court, through its interpretations of what is constitutionally permissible, has sanctioned various forms of government aid to parochial

schools, aid which requires increasing allotments of tax money to parochial schools and which fosters increasing church school dependence on the federal government. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 797-98.

To maintain flexibility while preserving the cherished safeguard of the Establishment Clause, the Court has steered away from a "legalistic minuet in which precise rules and forms must govern." *Lemon* v. *Kurtzman* (and its companion *Earley* v. *DiCenso*), 403 U.S. 602, 614, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971). The line of separation between church and state is, according to the Court, necessarily maintained as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Id.* Aid to private church-affiliated colleges is upheld because these higher institutions are "less likely" to inculcate religious values than their "pervasively sectarian" elementary and secondary school counterparts. "This reduces the risk that government aid will in fact serve to support religious activities." *Tilton* v. *Richardson*, 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L. Ed. 2d 790 (1971). Aid to elementary schools in the form of *off-premise* remedial instruction has been upheld because the entanglement is not "excessive," *Wolman* v. *Walter*, 433 U.S. 229 (1977), and aid in the form of textbooks is permissible because its "primary" effect is not to foster religion but to promote the secular education of all children, regardless of their religion. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). "That religion may indirectly benefit from governmental aid to the sectarian activities of churches does not convert that aid into an impermissible establishment of religion." *Lemon* v. *Kurtzman*, 403 U.S. at 664 (White, J., concurring).

At apparent odds with the blurred barriers or standards set by the Court is the Constitution's admonition that Congress shall make no law "respecting" the establishment of religion—that is, a law which could "lead" to the establishment of a state church or state religion or a law which the Supreme Court

considers to be "step" in that direction. *Lemon* v. *Kurtzman*, 403 U.S. at 612, 624.

The "danger" or "risk" that certain forms of governmental aid can be diverted to religious use in some cases is sufficient to preclude that aid. *See, e.g., Wolman* v. *Walter*, 433 U.S. at 250. With respect to other forms of governmental aid, such as remedial instruction, the "danger" creates a need for the government perpetually to monitor the aid to ensure its ultimate neutrality and to guarantee that the aid is not used to foster religion.[11] This necessity for surveillance in turn creates the "potential" or "possibility" of excessive entanglement. *Meek* v. *Pittenger*, 421 U.S. 349, 372, 95 S. Ct. 1753, 1766, 44 L. Ed. 2d 217 (1975). Even aid which creates a mere "diminished probability" of impermissible use does not pass constitutional muster. *Id.* at 370-71. Thus plaintiffs in actions such as this need demonstrate only an *unacceptable risk* of constitutional harm, not actual prejudice. With respect to subsidized teachers, "the State must be *certain*, given the Religion Clauses, that [they] do not inculcate religion." *Meek* v. *Pittenger*, 421 U.S. at 371, quoting *Earley* v. *DiCenso*, 403 U.S. at 619 (emphasis added).

In summary, the Supreme Court since 1971 has justified various forms of aid to religiously affiliated schools first, by

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[11] In *Felton*, the court noted that taxpayers interested in the preservation of the Establishment Clause "cannot reasonably be expected to mount perpetual guard." Further, the court stated, "In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. . . . [T]here could be no greater step away from the goal of *reasonable certainty* than to adopt a rule that the validity of a program should hinge on its precise workings from year to year." *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, ___ U.S. ___ (1984).

avoiding a ritualistic or literal quest for the advice of the Founding Fathers with its blurred barriers, and second, by determining that the challenged practices do not even tend to promote the type of interdependence between religion and state which the First amendment was designed to prevent.

The Court has advanced three tests for use in analyzing Establishment Clause challenges to statutes providing aid for parochial school children; all must be passed for the statute to survive the challenge. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advance nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon* v. *Kurtzman* (and its companion *Earley* v. *DiCenso*), 403 U.S. at 612-13.

A. Secular Legislative Purpose

The express purpose of Title I is to provide remedial education for all educationally deprived children meeting certain criteria of need, regardless of whether they attend a religiously affiliated school or a public one. Plaintiffs do not suggest that the enactment of Title I was motivated by an improper purpose. It serves a purely secular and nondiscriminatory legislative end unassociated with the Church's separate goal to advance religion. The statute on its face and as administered satisfies the first test.

B. Primary Effect

Regardless of the permissible nature of its purpose, in order for this court to hold that a statute providing aid to religiously affiliated schools, as administered, neither advances nor inhibits religion, the aid must be identifiable and separable from assistance to sectarian activities. *See Wolman* v. *Walter*, 433 U.S. at 250; *Committee for Public Education of Religious Liberty* v. *Nyquist*, 413 U.S. at 782. Additionally, the aid must primarily benefit the child or student rather than the sectarian institution. *Everson* v. *Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 2d 71 (1947). While it is undisputed that aid in

the form of textbooks, transportation, and certain diagnostic services ultimately results in financial support for the collective enterprise of sectarian institutions, the Court has determined that this support is a mere by-product of aid which primarily benefits the child. *Id.* In contrast, aid has a primary effect of advancing religion when it flows directly to pervasively sectarian institutions or when it funds a specifically religious activity in an otherwise secular setting. *Hunt* v. *McNair*, 413 U.S. 734, 743, 93 S. Ct. 2868, 2874, 37 L. Ed. 2d 923 (1973). *See also Wolman* v. *Walter*, 433 U.S. at 251 (invalidating loan for instructional material and equipment because it "inescapably" had the improper primary effect of advancing the sectarian enterprise).

The present case involves remedial aid provided by teachers paid and supervised by a tax-supported nonreligious entity, BHHC, authorized by a statute which on its face provides that it shall not "be construed to authorize the making of any payment under this chapter for religious worship or instruction." 20 U.S.C. § 3384. In fact, there is no evidence that any BHHC teacher has advanced religious ideologies in accomplishing Title I instruction. The Supreme Court, in *Wolman*, upheld such aid *off-premises*, finding that the aid did not have a primary effect which advanced religion. 433 U.S. at 248. Implicit in this finding is the conclusion that the aid was identifiable and separable from assistance to sectarian activities, and that it primarily benefited the student.

In the present case, the instruction takes place *on-premises* in a room only sometimes identified as the "Title I room." Title I instruction supplements rather than supplants other instruction, thus maximizing the benefit to students who would otherwise receive no such instruction and minimizing the benefit to the school as a whole. Thus, plaintiffs contend that the location of instruction does not alter the primary effect of Missouri's Title I program.

This court is prepared to accept the conclusion that in the administration of this program the nonpublic schools are not

relieved of any financial responsibility. However, this court recognizes that plaintiffs' conclusion—that the location does not alter the primary effect—is difficult to prove to a "certainty" because, while the evidence in this case was extensive the surveillance over the teachers was not. Sectarian ideologies, encouraged in a pervasively sectarian institution, may be introduced through subtle references. While the location does not diminish the benefit to children, it renders it more difficult to "identify and separate" the functions of Title I instruction or to ascertain whether the aid has a direct rather than incidental or an immediate rather than remote effect of advancing religion.

Substantial aid to the education of parochial school children necessarily results in some aid to the sectarian enterprise as a whole, *Wolman* v. *Walter*, 433 U.S. at 250, and a law found to have a legitimate "primary" effect to benefit children is not immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 789, n.39. This court concurs with *Nyquist*. "We do not think that such metaphysical judgments are either possible or necessary" under the circumstances of this case. 413 U.S. at 738, n.39. *See also Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F. 2d at 69-70.

C. Excessive Entanglement

To prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of the other," *Lemon* v. *Kurtzman*, 403 U.S. at 614, the Court devised a third standard which demands that the program avoid "an excessive government entanglement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414, 25 L. Ed. 2d 697 (1970). The test of "excessive entanglement" is "inescapably one of degree." *Id.*

To determine whether the statute or its administration fosters "excessive entanglement" between the church and the

government, the court must examine the character and purposes of the institutions that are benefited. *Lemon* v. *Kurtzman*, 403 U.S. at 615. If an institution is "pervasiavely sectarian." *Meek* v. *Pittenger*, 421 U.S. 349 (1975), or indistinguishable from one that is, *Wolman* v. *Walters*, 433 U.S. 229 (1977), the court must examine the nature of the aid that the State provides, the resulting relationship between the government and the religious authorities, and the potential for "political divisiveness" created by the program. *See Lemon* v. *Kurtzman*, 403 U.S. at 615.

To determine whether a school is pervasively sectarian and, therefore, subject to strict Establishment Clause limitations, the Supreme Court has adopted the following guidelines: (1) Is it *controlled* by a church or religious organization? (2) Is its *purpose* to teach, propogate, and promote a particular religious faith and to inculcate religious values? (3) Does it *conduct* its programs to fulfill that purpose? (4) Are there religious *restrictions* on admissions of students or on faculty appointments? (5) Does it *require instruction* on religious doctrine and impose religious restrictions on what the faculty may teach? (6) Does it *require attendance* at or participation in religious worship? (7) Is the school an *integral part* of the mission of the church? *Meek* v. *Pittenger*, 421 U.S. at 356.

This court encounters no difficulty in finding on the basis of the record made here that the religiously affiliated elementary schools in Missouri at which BHHC conducts classes funded by federal tax dollars are pervasively sectarian or indistinguishable from those that are for purposes of constitutional analysis. While all of the schools in question here do not possess all the characteristics found in *Meek*, they are essentially schools in which education is an integral part of the dominant sectarian mission of the church and in which an atmosphere dedicated to the advancement of religious beliefs is constantly maintained. *Meek* v. *Pittenger*, 421 U.S. at 371. In determining whether the Establishment Clause is at issue, this court has not engaged in a school by school, year by year analysis. To ensure that *each* school each year was not

"pervasively sectarian" would require extensive revision of the existing structures and extensive government restrictions. Such surveillance would entail even greater entanglement than that found here and would obviously offend the Establishment Clause. In like manner, an analysis of the character of each school is not required by the Establishment Clause. *See Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 68.

Unlike *Tilton* v. *Richardson*, 403 U.S. 672 (1972), in which the aid was a "one-shot" allocation of funds for college buildings, the Title I program requires continuing allocations based on the number of children served and subject to inflation and escalating needs. The need for annual appropriations and the knowledge "from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies," *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 797-98, led the Court, first in *Lemon*, to consider the "potential for political divisiveness" in its discussion of "excessive entanglement." 403 U.S. at 622-25. In *Nyquist*, the Court noted, "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws . . . it is certainly a 'warning signal' not to be ignored" 413 U.S. at 797-98. In *Meek*, the Court again discussed political divisiveness, holding that political fragmentation along religious lines, *together* with administrative entanglement necessary to insure services in church-related schools are strictly neutral and nonideological "compels the conclusion that [the state statute] violates the constitutional prohibition against laws 'respecting an establishment of religion,' " 421 U.S. at 372. Political divisiveness is evidenced in Missouri, not only through efforts to increase or decrease annual appropriations, but through a history of continuing litigation, through the persistent indignation of plaintiffs,, including Hugh Wamble of the Southern Baptist Convention, and through the disputes which occur between church factions, some of which would not agree to the removal of

church symbols in Title I rooms or the total relinquishment of control to a federally funded corporation.

In pervasively sectarian elementary and secondary schools, the risk of indoctrination or the process of inculcating religious doctrine is enhanced because the children are at an impressionable age.[12] *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 616. The correspondingly high risk of indoctrination requires this court to scrutinize closely the nature of the aid and the relationship between the government and the religious authorities.

In this case, the nature of the aid is on-premise remedial instruction by government subsidized teachers. Government subsidization of Title I instruction in Missouri is unlike any other form of government controlled aid because it directly involves teachers placed on the premises of the pervasively sectarian environment. First, teachers are peculiarly susceptible to influence by their environment. *Wolman* v. *Walter*, 433 U.S. at 247. Second, unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views. *Id.* Third, a teacher's handling of a subject is unpredictable. Because instruction, unlike the content of a textbook, inherently varies from teacher to teacher in content and emphasis, there is a great potential for involving in that content some aspect of faith or morals. *Lemon* v. *Kurtzman*, 403 U.S. at 617.

Because this is so, the task of this court is to ascertain whether, without excessive entanglement, the 'state [can] be certain, given the Religion Clause, that subsidized teachers do

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[12] Distinguishable are those cases where the Court has upheld aid to religiously affiliated colleges because college students are less impressionable, because religious indoctrination is not a substantial purppose or activity, because there is less likelihood that religion will permeate the secular advocation, and, therefore, because the schools are not pervasively sectarian for purposes of constitutional analysis. *Tilton* v. *Richardson*, 403 U.S. 672 (1972).

not inculcate religion" when placed on the premises of pervasively sectarian institutions, albeit in rooms largely devoid of religious symbols. *Meek* v. *Pittenger*, 421 U.S. at 370-71. Because it is required that the state be "certain," it cannot place reliance "on the subjective good faith and professionalism of sectarian teachers." *Id.* at 369. The fact that BHHC's Title I instructors in this case assert that environmental pressures do not influence their work and that religious views are not conveyed to the students is insufficient to diminish significantly the risk or danger of unconstitutional indoctrination. Thus, the state becomes obligated to perform a nearly impossible task, the task of reviewing both the content and the total environment of instruction to determine that whatever is transmitted adheres to the restrictions imposed by the statute and by the Constitution.

Meek and *Wolman* indicate that the supervision, while it is by government-paid authorities over government-paid and supervised teachers, is not significantly distinct from the continuing surveillance required over religiously controlled teachers, *unless* the facilities themelves are religiously neutral. *Wolman* v. *Walter*, 433 U.S. At 247; *Meek* v. *Pittenger*, 421 U.S. at 371-72. Influence on a therapist's behavior can be exerted either by the fact that he serves a sectarian administrator or the fact that he operates under the pervasive atmosphere of a religious institution. The danger arises from the nature of the institution, not the nature of the pupils. *Wolman* v. *Walter*, 433 U.S. At 247-48.

If these services are offered at truly *religiously neutral locations*, the danger perceived in *Meek* does not arise, and the corresponding entangling supervision by publicly paid state inspectors on parochial school property would be largely unnecessary. *Wolman* v. *Walter*, 433 U.S. at 247-48. "Supervision of public employees performing public functions *on public property* does not create any entanglement between church and state. *Id.* at 248 (emphasis added). Instruction conducted *on the premises* of pervasively sectarian institutions, on the other hand, while providing a practical response to the grow-

ing economic needs of parochial schools and the state, creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance.[13]

The nature of the aid—continuing remedial instruction on-premises—necessarily contaminates the relationship between the religious authorities and the government's independent contractor.[14] On-premise teachers, although technically and legally supervised by state authorities are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision. *See Wolman* v. *Walter*, 433 U.S. 229 (1977). "The prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and

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[13] Some might argue that this is an "absolutist" approach, a "categorical imperative" or a "per se" rule. In response, this court notes first, that it is a holding based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution. *See* p.p. 15-16. Second, the court notes that such a holding reflects no more of an "absolutist" approach than the Supreme Court's own guidelines on textbooks, buses, diagnosticians, and equipment which, while they appear to be "per se" rules, obviously followed a similar analysis.

[14] The Court in *Wheeler* v. *Barrera*, 417 U.S. at 426 indicated that the Fourth Amendment implications may vary according to the precise contours of the plan that is formulated. It noted that a program whereby a former parochial school teacher is paid presents "quite different problems" from a program whereby a public school teacher, under public control, is sent into the parochial school. We agree that *different problems* are presented and note the wisdom of the Court's admonition that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*

state." *Meek* v. *Pittenger*, 521 U.S. at 370, citing *Lemon* v. *Kurtzman*, 403 U.S. at 619.

The *danger* perceived in *Meek* does not subside with the abandonment of religious artifacts. Religious neutrality cannot exist on the premise of a pervasively sectarian institution. The need for state monitoring in parochial schools is a continuing one. Even monitoring, however, cannot extinguish subliminal pressure exerted by the mere presence of a priest in the hall or at the door, by religious books in every student's hands, and by a teacher's own felt presence of the Church in the room.

The room belongs to the church and is in its ultimate control. Like the public school teachers described in *Felton*, BHHC's Title I instructors are

> so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same buildings, teach the same students, and confer with the teachers hired by the religious schools, many of the members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

Felton v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 67-68. It cannot be said that on-premise Title I rooms, like the off-premise sites in *Wolman*, are "neither physically nor educationally identified" with the nonpublic school. *See Wolman* v. *Walter*, 433 U.S. at 247.

To prevent teachers from indoctrinating children with values of the church, the government is not only required to maintain rooms free of religious symbols, it is required to monitor the instruction and to guard against visible religious authorities who by their presence at or near a Title I room may inadvertently pressure teachers to confrom. *See Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961, 94 S. Ct. 3163, 41 L. Ed. 2d 1154 (1974). The need for this constant on-premise monitoring or surveillance, described by some courts as "state inspectors prowling the halls of parochial schools and auditing classroom

instruction," *Fleton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 67, citing *Lemon* v. *Kurtzman*, 403 U.S. at 650 (opinion of Brennan, J.), added to the routine administrative contacts otherwise required to establish the program, to coordinate schedules, and to advise parochial school teachers of a student's progress, creates entanglement which far surpasses that necessitated by off-premise instruction.[15]

Religion demands a spiritual identification. The obvious covering of religious symbols and removal of religious artifacts do not diminish qualitatively the spirituality of an environment otherwise pervasively sectarian. And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to protect has been fostered—the church has been compromised

Analytically, a government that can provide on-premise remedial instruction in parochial schools may provide on-premise instruction in all secular subjects in those schools. *Accord Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d at 66-67. Because we recognize that the religiously affiliated school, as a *whole*, has a central purpose, the fostering of religion, and that the pieces comprise the whole, we recognize that state control over any substantial portion of those pieces undermines the purpose of religious instruction and denigrates the institution's ability to convey freely religious ideals within its own walls and to integrate these values with education. Title I, on its face, does not require or suggest that its program be conducted on the premises of religiously affiliated schools.

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[15] *Meek* rested on the conclusion not that instruction of pervasively sectarian premises actually "fostered" religion, but rather that it required *monitoring* violative of the entanglement test. *Wolman* affirmed *Meek's* prohibition of services, stating that the "danger arose [in *Meek*] from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." *Wolman* v. *Walters*, 433 U.S. at 247.

See Wheeler v. *Barrera*, 417 U.S. at 419. On its face, Title I does not violate the Establishment Clause.

The momentum developed in this area of the law may continue only if sanctioned by further Supreme Court opinions. The risk early envisioned by the Court is increased by the "difficulty of perceiving in advance exactly where the 'verge' of the precipice lies." *Lemon* v. *Kurtzman*, 403 U.S. at 624. We concur with the Second Circuit in *Felton*. *Wolman* suggests constitutionally permissible alternatives—all off-premises at religiously neutral sites. Current law does not permit the extension of tax-supported remedial instruction into parochial schools. The precipice lies here.

Epiloge

There is a danger that this decision may be misconstrued by large segments of our society, both those who will agree with it and those who will condemn it. Some may say, because of the strength of their varying convictions, that this result is "anti-religious" in general or "anti-Catholic" in particular. The court mentions this only because there has been intertwined in the filings, court presentations, and in the prior ardent lobbying efforts of the *pro se* plaintiff in particular, some suggestion that his is a crusade against a diabolical heirarchy which is set upon destroying free religion in America. The court expressly disavows any such view.

In reaching the result here announced, this court wants it made absolutely clear that it tolerates no part of the thinking of the "Know Nothings" of the mid-19th Century, or the polemics of Paul Blahsard in the 1930's and 40's or the 1960 opposition to John F. Kennedy because of his Catholicism. If the plaintiffs draw comfort for any such point of view out of this decision, it is only by the sheerest and most accidental coincidence of their views and the dictates of First Amendment law as it has been previously announced by the Supreme Court.

This court is not insensitive to the emotionally unpopular termination of a program of aid to educationally deprived chil-

dren which may *but need not necessarily* follow this decision. Educational assistance to children who through no fault of their own have been deprived in their early lives and whose futures may be bleak without the kind of remedial education envisioned by this statute is entirely consistent with the long-held American goal of equal access to education for all. Be that as it may, this result is one that is dictated by the necessity of preserving one of the cherished freedoms guaranteed by our Constitution. We concur with Judge Friendly. Such freedoms were hard won and they are protected only by hard decisions.

Accordingly, it is

ORDERED that defendants' Motion to Stay Disposition of this case is denied. It is further.

ORDERED that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in that manner, is therefore, permanently enjoined. It is further

ORDERED that this injunction be stayed pending disposition by the Supreme Court of *Felton* v. *Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, ____ U.S. ____ (1984).

/s/Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

November 28, 1984